CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 31 **APRIL 30, 1997** **NO. 18**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

Please visit the U.S. Customs Web at:
http://www.customs.ustreas.gov

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, April 16, 1997.

The following are abstracts of unpublished rulings recently issued by the U.S. Customs Service. The abstracts are set forth to provide interested parties with general information regarding the types of issues currently being addressed by the U.S. Customs Service. By their inclusion herein, the rulings abstracted shall not be considered "published in the CUSTOMS BULLETIN," within the meaning of section 177.10 of the Customs Regulations (19 CFR 177.10), nor do such abstracts establish a uniform practice.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 97–1)

The following ruling holds that, pursuant to Note 5 to Section XI, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), Customs position with regard to the interpretation of the term "dressed for use as sewing thread" is based on an examination of the physical properties of the thread and its dedicated use, the amount of dressing on the thread and the packaging and advertising of the thread.

TARIFF CLASSIFICATION OF SEWING THREAD

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice advises interested parties that Customs has determined a standard as per Note 5 to Section XI, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), pertaining to the tariff classification of sewing thread.

DATE: Effective immediately.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On November 13, 1996, Customs published in the CUSTOMS BULLETIN, Volume 30, No. 45/46, a notice of solicitation of comments regarding the classification of sewing thread and the interpretation of the term "dressed for use as sewing thread" as per Note 5 to Section XI, HTSUSA. Three comments were received in response to this notice.

In response to these comments, and as a result of numerous dialogues with noted experts in the trade, this office has determined an objective and practical standard by which to interpret the term "dressed for use as sewing thread". This interpretation is achieved through an analysis, on a case by case basis, of the following factors: (1) the physical properties of the thread and its dedicated use; and (2) the amount of dressing on the thread, that is, it cannot be an insignificant amount. Additionally, other factors, such as packaging and advertising will be considered.

Accordingly, this Notice and the ruling that follows sets out Customs position with regard to the interpretation of the term "dressed for use as sewing thread".

Dated: April 16, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 15, 1997.

CLA–2 RR:TC:TE 959169 jb
Category: Classification
Tariff No. 5402.61.0000

DANIEL F. ANGEVINE
EXCEL INTERNATIONAL CO.
147–48 182nd Street, Suite 201
Jamaica, NY 11413

Re: Classification of nylon filament embroidery thread; Section Note 5, Heading 5401; dressed for use as sewing thread.

DEAR MR. ANGEVINE:

This is in response to your letter, dated March 6, 1996, on behalf of your client, Kolon America Inc., requesting classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of nylon filament embroidery thread. Samples were submitted to this office for examination.

Facts:

The submitted merchandise consists of 100 percent nylon filament yarn which is put up on small bobbins for industrial use as embroidery yarn. Additionally, you state that this merchandise can be imported on cones and that it is not dressed for sewing; the packaging on the merchandise states "Nylon Thread for Embroidery". The subject thread is neither texturized nor of high tenacity.

Based on a report from our New York Customs laboratory, the subject sample is a two-ply nylon filament yarn, has a final "Z" twist, and has a dressing of 5.7 percent by weight.

Issue:

What is the proper tariff classification for the subject merchandise?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI.

Heading 5401, HTSUSA, provides for sewing thread of man-made filaments, whether or not put up for retail sale. Note 5 to Section XI, HTSUSA, states:

> For the purposes of headings 5204, 5401 and 5508, the expression *"sewing thread"* means multiple (folded) or cabled yarn:
>
> (a) Put up on supports (for example, reels, tubes) of a weight (including support) not exceeding 1,000 g:
> (b) Dressed for use as sewing thread; and
> (c) With a final "Z" twist.

In *Fairchild's Dictionary of Textiles,* 1967, at 521, sewing thread is defined as:

> A variety of yarn, regardless of fiber, which is treated with solid or semi-solid, waxy materials to secure a smooth, compact strand which is quite flexible, but which presents no loose fibers. The yarn is usually plied * * *. Sewing threads are numbered by various systems for size: in one system, number 40 is fairly coarse and would be suitable for sewing slip covers and drapery fabrics; number 60 is finer than 40 and would be used on percale or gingham. The higher the number, the finer the sewing thread.

Sewing thread is used to stitch or join one or more pieces of material or an object to a material; thus, sewing thread will have enough dressing to provide sufficient lubricity to insure needle heat dissipation so that the thread won't fray. This "dressing" is applied to the thread as a **finishing process** and not merely during the process of manufacture (the latter merely enables the merchandise to be more fully manufactured and is not directed at making the merchandise dedicated for use as sewing thread). Embroidery thread on the other hand, is not used to join fabrics or components together, but merely serves to provide ornamental stitching to a previously completed fabric. This thread does not require a high amount of dressing or coating. The purpose of the dressing in embroidery thread is to make the thread slide easily and to give a brilliancy and shine to the stitching. This brilliancy and sheen are important aesthetic properties to embroidery threads.

On January 5, 1996, Note 5(b) to Section XI was supplemented to make clear that sewing thread be **dressed for use as sewing thread.** The rationale for this change was the possibility that without an explicit statement specifying that sewing thread be dressed for use as such, yarns not intended to be sewing thread would be wrongly classified as sewing thread. This would be the case where such yarns met the criteria stipulated in paragraphs (a) and (c) of the Note and contained only a small residue of finishing agents derived from the initial stage of the manufacturing process, rather than from a finishing treatment, such as that found on sewing thread. Thus, the presence of only a small quantity of finishing agents might lead to false results in the classification. Accordingly, due to the change in the legal note, any rulings issued prior to the January 5, 1996 change to Note 5(b) to Section XI, are no longer valid. It thus follows that New York Ruling Letter (NY) 882278, dated February 4, 1993, issued to you on a similar issue, is no longer valid.

The submitted thread is put on supports weighing less than 1,000g and features a final "Z" twist. The issue remains whether it is "dressed for use as sewing thread". In determining how to qualify "dressed for use as sewing thread", we look to the physical properties of the thread and its dedicated use, the amount of dressing on the thread, that is, it cannot be an insignificant amount, and other factors, such as the packaging and advertising of the

merchandise. In regard to the subject merchandise, it appears that the physical properties of the thread would not dedicate its use as sewing thread.

Based on a physical examination of the subject merchandise, it is the opinion of this office that the coating applied to this merchandise is not as a result of a finishing process. It is apparent from the brilliancy and sheen attributable to the subject merchandise that this merchandise is embroidery thread. Furthermore, the statement on the packaging of the subject merchandise, "Nylon Thread for Embroidery", indicates that the intended use of the merchandise is as embroidery thread and not sewing thread.

Holding:

The submitted merchandise is properly classified in subheading 5402.61.0000, HTSUSA, which provides for, synthetic filament yarn (other than sewing thread), not put up for retail sale, including synthetic monofilament of less than 67 decitex: other yarn, multiple (folded) or cabled: of nylon or other polyamides. The applicable rate of duty is 8.6 percent *ad valorem* and the quota category is 606.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that your client check, close to the time of shipment, the *Status on Current Import Quotas (Restraint Levels)* an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs Office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local Customs office prior to importing the merchandise to determine the current applicability of any import restraints or requirements.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, April 16, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

MARVIN M. AMERNICK,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF MARINE STEERING WHEELS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking two rulings relating to the tariff classification of marine steering wheels. These articles are stainless steel tiller wheels for use in steering yachts and other pleasure boats. Notice of the proposed modification was published on March 12, 1997, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after June 30, 1997.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On March 12, 1997, Customs published a notice in the CUSTOMS BULLETIN, Volume 31, Number 11, proposing to revoke *NY* 814292, dated

September 13, 1995, and *HQ* 958727, dated March 21, 1996, affirming the first ruling. Both rulings classified the marine steering wheel as an article of iron or steel, in subheading 7326.90.85, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received in response to this notice. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking *NY* 814292 and *HQ* 958727 to reflect the proper classification of marine steering wheels in subheading 8479.90.95, HTSUS, a provision for other parts of machines and mechanical appliances having individual functions, not specified or included elsewhere in chapter 84. The rate of duty under this provision is 1.5 percent *ad valorem*. *HQ* 959613 revoking *NY* 814292 and *HQ* 958727 is set forth as the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: April 14, 1997.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 14, 1997.

CLA–2 RR:TC:MM 959613 JAS
Category: Classification
Tariff No. 8479.90.95

ARTHUR K. PURCELL, ESQ.
NEVILLE, PETERSON & WILLIAMS
80 Broad Street, 34th. Floor
New York, NY 10004

Re: *NY* 814292, *HQ* 958727 Revoked; marine steering wheel, stainless steering wheel for vessels; machines and mechanical appliances, parts; Section XVI, Note 2; articles of iron or steel, Subheading 7326.90.85; **Nidec Corporation v. United States,** *NY* 851734.

DEAR MR. PURCELL:

In *NY* 814292, dated September 13, 1995, Issued to a representative of your client, **The Pacific Bridge Company,** marine steering wheels where held to be classifiable as other articles of iron or steel, in subheading 7326.90.85, Harmonized Tariff Schedule of the United States (HTSUS). This ruling was affirmed in *HQ* 958727, issued to you on March 21, 1996.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agree-

ment Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of *NY* 814292 and *HQ* 958727 was published on March 12, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 11.

Facts:

The article in question, a stainless steel steering wheel for a yacht or pleasure boat, measures sixteen inches in diameter with five spokes attached to a hub 2½ inches in diameter at the front and tapering slightly at the back. Essentially, the article is a tiller wheel which, when turned manually by the pilot or navigator, transmits rotating motion through a shaft, bearings, bevel gears or gearing and cables, among other interposed apparatus, to manipulate the rudder and thus steer the boat. The various dictionary definitions and other technical materials you have submitted, including a standard published by the American Boat & Yacht Council, Inc., for steering systems for outboard, inboard, sterndrive and water jet drive boats, and an International Organization for Standardization (ISO) standard for small craft remote steering systems, indicate that marine steering equipment includes all of the mechanical apparatus interposed between the tiller wheel and head of the rudder.

You state that steering and rudder equipment for ships, other than rudders themselves, is provided for in HTS heading 8479. You claim that because the steering wheel forms an essential part of the vessel's steering and rudder apparatus, and is principally, if not solely used with such apparatus, Section XVI, Note 2(b), HTSUS, requires that it be classifiable in subheading 8479.90.95, HTSUS, a provision for other parts of mechanical appliances having individual functions, not specified or included elsewhere in [chapter 84].

The provisions under consideration are as follows:

7326	Other articles of iron or steel:
7326.90	Other:
7326.90.85	Other * * * 4 percent *ad valorem*
* * * * * * *	
8479	Machines and mechanical appliances having individual functions, not specified or included elsewhere in [chapter 84]:
8479.90	Parts:
8479.90.95	Other * * * 1.5 percent *ad valorem*

Issue:

Whether marine steering apparatus are machines or mechanical appliances of heading 8479; whether steering wheels are parts of this apparatus.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Subject to certain exceptions that are not relevant here, goods that are identifiable as parts of machines or apparatus of Chapter 84 or Chapter 85 are classifiable in accordance with Section XVI, Note 2, HTSUS. **Nidec Corporation v. United States,** 861 F. Supp. 136, *aff'd.* 68 F. 3d 1333 (1995). Parts which are goods included in any of the headings of Chapters 84 and 85 are in all cases to be classified in their respective headings. *See* Note 2(a). Other parts, if suitable for use solely or principally with a particular machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543), are to be classified with the machines of that kind. *See* Note 2(b).

The **Harmonized Commodity Description And Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The premise on which you base the parts claim under subheading 8479.90.95 is found in the heading 84.79 **ENs** at p. 1318, which list under **(III) MISCELLANEOUS MACHINERY,** steering and rudder equipment for ships, other than the rudders themselves (usually heading 73.25 or 73.26), and automatic pilots (Gyro pilots) of heading 90.14. The claim is that the steering wheel is part of steering and rudder equipment.

The cited **ENs** do not define what mechanical apparatus constitutes "steering and rudder equipment for ships." However, from the technical materials you have submitted, we agree that the mechanical apparatus interposed between the tiller wheel and the head of the rudder, as described above, would qualify as steering and rudder equipment for ships under the cited **ENs** for heading 8479. *NY* 851734, dated May 17, 1990, on yacht steering systems, supports this conclusion. We also agree that the marine steering wheel in issue is an integral, constituent and component part that is necessary to initiate the force or motion that ultimately manipulates the ship's rudder. By function and design, it is apparent that the steering wheel is principally if not solely used with marine steering and rudder equipment. Under Section XVI, Note 2 (b), HTSUS, the steering wheel qualifies as a part for tariff purposes. Because of the unique nature of steering and rudder equipment for ships, this analysis and conclusion is necessarily limited to the merchandise in question.

Holding:

Under the authority of GRI 1, stainless steel steering wheels for boats are provided for in heading 8479. They are classifiable in subheading 8479.90.95, HTSUS. *NY* 814292, dated September 13, 1995, and *HQ* 958727, dated March 21, 1996, are revoked.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A WOMAN'S SILK ASCOT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying New York Ruling Letter (NY) A83305, dated May 20, 1996, concerning the tariff classification of a woman's silk ascot. Notice of the proposed modification was published on February 26, 1997, in the CUSTOMS BULLETIN, Volume 31, No. 9.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 30, 1997.

FOR FURTHER INFORMATION CONTACT: Deann Schaffer, Textiles Branch, Tariff Classification Appeals Division (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 26, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, No. 9, a notice of a proposal to modify NY A83305, dated

May 20, 1996, which classified a woman's silk ascot under subheading 6217.10.1000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as "[o]ther made up clothing accessories; * * *, other than those of heading 6212: Accessories: Containing 70 percent or more by weight of silk or silk waste." No comments were received concerning this matter.

It is now Customs position that the articles are classifiable under subheading 6214.10.1000, HTSUSA, as "[S]hawls, scarves, mufflers, mantillas, veils and the like: Of silk or silk waste: Containing 70 percent or more by weight of silk or silk waste." The modification of NY A83305 does not pertain to style no. 17709496, a woman's scarf, also classified in NY A83305.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NY A83305, dated May 20, 1996, to reflect the classification of the merchandise under subheading 6214.10.10000, HTSUSA. Headquarters Ruling Letter (HQ) 959800, modifying NY A83305, is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), of the Customs Regulations (19 CFR 177.10(c)(1)).

Dated: April 10, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 10, 1997.
C.L.A.–2 RR:TC:TE 959800 DHS
Category: Classification
Tariff No. 6214.10.1000

ROBERT T. STACK
SIEGEL, MANDELL & DAVIDSON, P.C.
One Astor Plaza
1515 Broadway
43rd Floor
New York, NY 10036–8901

Re: Tariff classification of a woman's silk ascot; Modification of NY A83305; Heading 6214.

DEAR MR. STACK:

This is in response to a request by our New York Office to reclassify a woman's silk ascot from China which was classified in New York Ruling Letter (NY) A83305, dated May 20,

1996. Your original submission for a tariff classification was submitted on May 1, 1996, on behalf of your client, Ellen Tracy, Inc. We have reconsidered this ruling and determined that it is partially incorrect.

NY A83305 is modified in accordance with section 177.9(d) of the Customs Regulations (19 CFR 177.9(d)). Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed modification of NY A83305 was published on February 26, 1997, in the CUSTOMS BULLETIN, in Volume 31, No. 9. This ruling sets forth the classification of the woman's silk ascot.

Facts:

This office is not in receipt of a sample of the merchandise in issue. However, a sample was provided to the New York office for examination.

Style No. 17739496 was described in NY A83305 as a woman's ascot, measuring 36 inches in extended length and 8 inches at its widest points. The article is composed of 100% silk fabric.

Issue:

Whether the article in question is classifiable under subheading 6217.10.1000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), or subheading 6214.10.1000, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Heading 6214, HTSUSA, provides for shawls, scarves, mufflers, mantillas, veils and the like. The explanatory Notes of the Harmonized Commodity Description and Coding System (EN), although not legally binding, are the official interpretation of the tariff at the international level. The EN to Heading 6214, HTSUSA, states in pertinent part:

This heading included:

* * * * * * *

(2) Scarves and mufflers. These are usually rectangular and normally worn around the neck.

A scarf is defined by *Webster's New World Dictionary*, Third College Edition (1988), as "a long or broad piece of cloth worn about the neck, head, or shoulders for warmth or decoration; muffler, babushka, neckerchief, etc."

Heading 6217, HTSUS, provides for other made up clothing accessories. The term accessory is not defined in the tariff schedule or the Ens. *Webster's New World Dictionary*, Third College Edition (1988), defines accessory as "an article of clothing to complete one's costume, as a purse, gloves, etc."

GRI 3(a) provides in part:

The heading which provides the most specific description shall be preferred to headings providing a more general description.

Style No. 17739496 is a rectangular piece of silk that is designed to be worn around the neck area and specifically designated as an article classifiable under heading 6214, HTSUS. While it is also considered an accessory, it is more specifically provided for in heading 6214, HTSUS. Therefore, Style No. 17739496 is classifiable as a scarf under heading 6214, HTSUS. See the following cases where similar merchandise has been classified under heading 6214, HTSUS: HQ 086688, dated June 29, 1990, HQ 952800, dated February 19, 1993, HQ 957337, dated February 23, 1995, HQ 959608, dated September 12, 1996, HQ 957843, dated May 4, 1995, HQ 959275, dated June 13, 1996 and 959435, dated June 23, 1996.

Holding:

Based on the foregoing, the merchandise in question, Style No. 17739496, is classifiable under subheading 6214.10.1000, HTSUSA, which provides for "[S]hawls, scarves, mufflers, mantillas, veils and the like: Of silk or silk waste: Containing 70 percent or more by

weight of silk or silk waste." The applicable rate of duty is 3.8 percent as valorem and there is no textile restraint category. NY A83305, dated May 20, 1996, is modified to reflect the classification.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED MODIFICATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF FROZEN, BROILED EEL FILLETS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify two rulings pertaining to the tariff classification of frozen, broiled eel fillets.

DATE: Comments must be received on or before May 30, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Robert Cascardo, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7061.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify two rulings pertaining to the tariff classification of frozen, broiled eel filets. Comments are invited on the correctness of the proposed rulings.

In New York Ruling Letter (NYRL) 810216 dated May 16, 1995 and NYRL 897665 dated May 23, 1994, responding to requests for tariff classification rulings for frozen, broiled eel fillets, the products were determined to be classifiable, under subheading 1604.20.6010, Harmonized Tariff Schedule of the United States (HTSUS), which provides for prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs, other prepared or preserve fish, other, other, pre-cooked and frozen. NYRL 810216 is set forth as "Attachment A" to this document. NYRL 897665 is set forth as "Attachment B" to this document.

We now believe that the frozen, broiled eel fillets are classifiable under subheadings 1604.19.2000 or 1604.19.8000 HTSUS, which provide for fish, whole or in pieces, but not minced. Classification to the 8 digit level will depend upon whether the eel fillets are packed in airtight containers.

Before taking this action, consideration will be given to any written comments timely received. Proposed HRL 959210 modifying NYRL 810216 is set forth in "Attachment C" to this document. Proposed HRL 959211 modifying NYRL 897665 is set forth in Attachment D" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: April 15, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, May 16, 1995.

CLA–2–16:S:N:N7:231 810216
Category: Classification
Tariff No. 1604.20.6010

MR. ROBERT HARTMAN
WILLIAM A. FLEGENHEIMER
11048 South La Cienega Boulevard
Inglewood, CA 90304

Re: The tariff classification of frozen broiled eel from Taiwan.

DEAR MR. HARTMAN:

In your letter, dated April 20, 1995, you have requested a tariff classification ruling, on behalf of your client, Marubeni America Corporation, Seattle, WA.

The Product is frozen, broiled eel (Kabayaki Unagi) that has been sliced down the middle. The ingredients are soy sauce, sugar, rice wine, caramel color, monosodium glutamate, and starch. The product is packaged in airtight containers (vacuum packed).

The applicable subheading for the frozen broiled eel (Kabayaki Unagi) will be 1604.20.6010, Harmonized Tariff Schedule of the United States (HTS), which provides for prepared or preserved fish: caviar and caviar substitutes prepared from fish eggs, other prepared or preserved fish, other, other, pre-cooked and frozen. The rate of duty will be 4.8 percent *ad valorem*.

Additional requirements may be imposed on this product by the Food and Drug Administration. You may contact the FDA at:

Food and Drug Administration
Division of Regulatory Guidance
200 C Street, S.W.
Washington, DC 20204

This ruling is being issued under the provisions of Section 177 or the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, May 23, 1994.

CLA–2–16:S:N:N7:231 897665
Category: Classification
Tariff No. 1604.20.6010

MR. MICK W. BLAKELY
C.F. LIEBERT, INC.
#8–12th Street
P.O. Box 1890
Blaine, WA 98231–1890

Re: The tariff classification of broiled eel fillet from China.

DEAR MR. BLAKELY:

In your letter dated April 29, 1994, On behalf of Fairline Seafoods (Canada) Ltd., Canada, you requested a tariff classification ruling.

The product is described as frozen broiled eel fillet in retail packages with the following ingredients: eel, soy sauce, sweet saki, sugar, pepper and monosodium glutamate. The goods are a product of China shipped from a foreign trade zone in Vancouver, Canada.

The applicable subheading for the broiled eel fillet will be 1604.60.2010, Harmonized Tariff Schedule of the United States (HTS), which provides for prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs: other prepared or preserved fish: other: other: pre-cooked and frozen. The rate of duty will be 6 percent *ad valorem*.

Additional requirements may be imposed on this product by the Food and Drug Administration. You may contact the FDA at:

Food and Drug Administration
Division of Regulatory Guidance
200 C Street, S.W.
Washington, D.C. 20204

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:TC:FC 959210 RC
Category: Classification
Tariff No. 1604.19.2000

MR. ROBERT HARTMAN
WILLIAM A. FLEGENHEIMER
11048 South La Cienega Boulevard
Inglewood, CA 90304

Re: Reconsideration and Modification of New York Ruling Letter (NYRL) 810216; Frozen, Broiled Eel Fillets.

DEAR MR. HARTMAN:

This is in reference to NYRL 810216, dated May 16, 1995, issued to you on behalf of Marubeni America Corporation, Seattle, Washington, concerning the classification of frozen, broiled eel fillets. In NYRL 810216, Customs found that the eel was classifiable under 1604.20.6010, HTSUSA, the provision for prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs, other prepared or preserved fish, other, other, precooked and frozen. This letter is to inform you that NYRL 810216 no longer reflects the views of the U.S. Customs Service. The following represents our position and modifies that ruling.

Facts:

The subject merchandise is frozen, broiled eel fillets (Kabayaki Unagi). The eel has been sliced down the middle into fillets and prepared with soy sauce, sugar, rice wine, caramel color, monosodium glutamate, and starch. No oil is added to the product. The product is packaged in airtight containers (vacuum packed).

Issue:

Whether the frozen, broiled eel fillets are classifiable under subheading 1604.19.2000, HTSUSA, as fish, whole or in pieces, but not minced; or under subheading 1604.20.6010, HTSUSA, as other prepared or preserved fish.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRIs.

Heading 1604, HTSUS, provides for "Prepared or preserved fish * * * whole or in pieces, but not minced." The ENs to heading 1604 indicate that among other items, the heading covers fish prepared or preserved in oil, and that the products remain classified in the heading whether or not they are put up in airtight containers.

Upon review of NYRL 810216, we find that it is incorrect. The frozen, broiled eel fillets are more specifically provided for in subheading 1604.19.2000, HTSUSA, as fish, whole or in pieces, but not minced rather than in subheading 1604.20.6010, HTSUSA, as other prepared or preserved fish.

Holding:

The frozen, broiled eel fillets fall into subheading 1604.19.2000, HTSUSA, the provision for "Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs; Fish, whole or in pieces, but not minced: Other (including yellowtail): In airtight containers; Not in oil: Other." Dutiable at 5.2 percent *ad valorem*.

NYRL 810216 is modified.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:FC. 959211 RC
Category: Classification
Tariff No. 1604.19.2000 and 1604.19.8000

MR. MICK W. BLAKELY
C.F. LIEBERT, INC.
#8–12th Street
P.O. Box 1890
Blaine, WA 98231–1890

Re: Reconsideration and Modification of New York Ruling Letter (NYRL) 897665; frozen, broiled eel fillets.

DEAR MR. BLAKELY:

This is in reference to NYRL 897665, dated May 23, 1994, issued to you on behalf of Fairlane Seafoods, Ltd., Canada, concerning the classification of frozen, broiled eel fillets. In NYRL 897665, Customs found that the eel was classifiable under 1604.20.6010, HTSUSA, the provision for prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs, other prepared or preserved fish, other, other, pre-cooked and frozen. This letter is to inform you that NYRL 897665 no longer reflects the views of the U.S. Customs Service. The following represents our position and modifies that ruling.

Facts:

The subject merchandise is frozen, broiled eel fillets. The eel has been sliced down the middle into fillets and prepared with soy sauce, sweet saki, sugar, pepper, and monosodium glutamate. No oil is added to the product. It is not clear whether the product is packaged in airtight containers (vacuum packed).

Issue:

Whether the frozen, broiled eel fillets are classifiable under subheading 1604.19.2000, HTSUSA, as fish, whole or in pieces, but not minced, in airtight containers; under subheading 1604.19.8000, HTSUSA, as fish, whole or in pieces, but not minced, not in airtight containers; or under subheading 1604.20.6010. HTSUSA, as other prepared or preserved fish.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of

the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRIs.

Heading 1604, HTSUS, provides for "Prepared or preserved fish * * * whole or in pieces, but not minced." The ENs to heading 1604 indicate that among other items, the heading covers fish prepared or preserved in oil, and that the products remain classified in the heading whether or not they are put up in airtight containers.

Upon review of NYRL 897665, we find that it is incorrect. The eel fillets are more specifically provided for in subheading 1604.19.2000, HTSUSA, as fish, whole or in pieces, but not minced, in airtight containers or in subheading 1604.20.6010, HTSUSA, as other prepared or preserved fish.

Holding:

Depending upon whether or not the frozen, broiled eel fillets are packaged in airtight containers, they are classifiable either under subheading 1604.19.2000, HTSUSA, the provision for "Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs: Fish, whole or in pieces, but not minced: Other (including yellowtail): In airtight containers: Not in oil; Other" dutiable at 5.2 percent *ad valorem* or under subheading 1604.19.8000, HTSUSA, the provision for "Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs; Fish, whole or in pieces, but not minced: Other (including yellowtail): Other: Other: Other" dutiable at 6 percent *ad valorem*.

NYRL 897665 is modified.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, April 16, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, constitutes the correct version of an erroneously published Headquarters ruling letter relative to an untimely temporary importation under bond extension request.

MARVIN M. AMERNICK,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

CORRECTION OF PUBLISHED CUSTOMS RULING LETTER RELATING TO UNTIMELY T.I.B. EXTENSION REQUEST

ACTION: Replacement of a published Headquarters ruling letter by the correct version.

SUMMARY: An incorrect unsigned draft version of a Headquarters ruling letter was inadvertently released in electronic format and diskettes by Customs. After Customs became aware of the electronic release of the incorrect version of the ruling, Customs replaced the published ruling letter with the correct and signed ruling letter.

DATE: April 11, 1987

FOR FURTHER INFORMATION CONTACT: Ieva Karklins O'Rourke, Office of Regulations and Rulings, International Trade Compliance Division, Entry and Carrier Rulings Branch (202–482–7078).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Headquarters Decision 223474 was issued on April 3, 1992. However, a draft, unapproved and unsigned version of HQ 223474 was inadvertently released by Customs as part of the diskette subscription service and Internet. The unapproved, unsigned draft does not reflect Customs position as contained in the final signed ruling sent to the requesting party and may not be relied upon. The correct and signed ruling letter, HQ 223474, is included as an attachment and has been made available to the public electronically.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 3, 1992.

BON–1–04 CO:R:C:E: 223474 TLS
Category: Entry

DISTRICT DIRECTOR
U.S. CUSTOMS SERVICE
1 East Bay Street
Savannah, GA 31401

Re: Request for extension of temporary importation bond (TIB) #110–1712335–4; 19 CFR 10.37.

DEAR SIR:

The above-referenced request has been forwarded to this office for consideration. We have considered the points raised by the importer and your office. Our decision follows.

Facts:

The subject bond had already been extended for one year when it expired on June 6, 1991. The importer filed a request for extension by letter dated September 4, 1991. The letter, of course, came after the expiration date but before a demand for liquidated damages was issued. Such demand remains unissued pending the outcome of this decision.

The September 4 letter explained the basis for requesting a second extension. About six weeks after the original entry involving two separate products was made, the entire bulk of one particular product was exported. At this point, all of the second product remains in the U.S. The importer requested the first extension and is requesting this extension because the remaining product is exported to countries where the political climate is volatile. For this reason, it is explained, no orders have been received for this product to date. The merchandise is currently warehoused where it has been since entered; it has not been tampered with in any sense. If the extension is granted, the merchandise will be reformulated for any orders received. No details were provided on the reformulation, however.

Issue:

Whether Customs denial of a second extension of the temporary importation bond is proper when the importer untimely made a request for such because it had not received any orders for the merchandise to date.

Law and Analysis:

The Customs regulations cover extensions of temporary importation bonds (TIBs). Under 19 CFR 10.37, the following is provided for:

> **Extension of time for exportation.**
> The period of time during which merchandise under [a TIB entry] may remain in [the Customs territory] may be extended for not more than two further periods of 1 year each * * * Any *untimely request for an extension of time for extension of time for exportation shall be referred to [the Entry Rulings Brunch at Customs Headquarters] for disposition*. (Emphasis added.)

The importer has requested a second extension because it has not received orders for its product. The political environment of the countries that the importer routinely does business in has been volatile, making it difficult to do business in that region of the world. The importer argues that Customs should recognize the circumstances and grant the extension on that basis, just as it did in the first instance. The untimeliness of the request is explained as a confusion as to what had been exported initially. The importer's broker stated that she mistakenly believed that the entire contents of the subject entry had been exported during that intial transaction.

We do not find sufficient reason to overturn the decision of the district director in this case. While we have found reason to grant extensions of TIBs in certain cases even when the importer had untimely requested such, unforeseen circumstances had existed in those cases. For instance, in one case the importer had imported merchandise for a trade show that was subsequently cancelled before the merchandise was used. A request for an extension of the TIB had been requested before the bond was to expire. The district director de-

nied the request with the rationale that the importer no longer had use for the TIB since the trade show was cancelled; therefore, no extension was warranted. We disagreed, finding that the importer had met all the requirements for an extension and there was a possibility that the merchandise might be used in another trade show. The extension was granted retroactively back to the date when the timely request would have been effective if granted. Customs ruling HQ 221486 (August 21, 1989).

In the present case, the importer does not offer a compelling enough reason to grant the extension despite its untimeliness. While we do not dispute the volatile nature of the political climate of countries where the importer routinely sells its product, we do not find it to be an unforeseen circumstance such as the one found in HQ 221486. The importer had to know of the situation at least a year before a second request should have been made, as the first request was granted for the very same reason. Furthermore, the broker's oversight also does not provide sufficient justification for the untimeliness of the request. Therefore, we find the district director's decision to be proper in this case.

Holding:

The district director's decision to deny a second extension of the temporary importation bond in this case is proper because the request was untimely. This ruling affirms that decision and the request is further denied. The district director may proceed with collection of liquidated damages on the bond.

JOHN DURANT,
Director,
Commercial Rulings Division.

U.S. Customs Service

Proposed Rulemaking

RECORDKEEPING REQUIREMENTS

RIN 1515–AB77

19 CFR Parts 24, 111, 143, 162, and 163

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations by adding a new part which will cover recordkeeping requirements and reflect legislative changes to the Customs laws regarding recordkeeping, examination of books and witnesses, regulatory audit procedures and judicial enforcement. These statutory amendments are contained in the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act. The new provisions are being incorporated into the new part with the existing recordkeeping requirements (presently in Part 162) which remain effective, although they are being updated to permit the use of new technology and alternative methods for record maintenance. The proposed amendment also contains provisions establishing a voluntary recordkeeping compliance program.

DATES: Comments must be submitted on or before June 23, 1997.

ADDRESSES: Written comments on the proposed regulation (preferably in triplicate) must be submitted to the U.S. Customs Service, ATTN: Regulations Branch, Franklin Court, 1301 Constitution Avenue, NW., Washington, D.C. 20229, and may be inspected at the Regulations Branch, 1099 14th Street, NW, Suite 4000, Washington, D.C.

Copies of the Recordkeeping Compliance Handbook are available from the public access Customs Electronic Bulletin Board (703) 440–6155 or by requests addressed or faxed to the following:

U.S. Customs Service
Regulatory Audit Division, Miami Branch
909 S.E. First Street, Suite 710
Miami, FL 33131
Attention: Recordkeeping Compliance Program
Fax: (305–536–7442)

Written comments on the Recordkeeping Compliance Handbook may be sent by facsimile or mail to the following address:

U.S. Customs Service
Regulatory Audit Division, Atlanta Branch
1691 Phoenix Boulevard, Suite 250A
College Park, GA 30349
Attention: Recordkeeping Compliance Program
Fax: (770–994–2270)

FOR FURTHER INFORMATION CONTACT:

For questions relating to recordkeeping in general, and the voluntary Recordkeeping Compliance Program, call Stan Hodziewich, Regulatory Audit Division, Washington, D.C. at (202–927–0999) or Howard Spencer, Regulatory Audit Division, Atlanta Branch at (770–994–2273, Ext.158).

For questions relating to the Appendix ((a)(1)(A) list), its underlying documents and other entry records/information call Rychelle Ingram, Office of Trade Compliance 202–927–1131.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, the President signed Public Law 103–182, the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act)(107 Stat. 2057). Title VI of this Act, known as the Customs Modernization Act (the Mod Act), amended certain Customs laws. Sections 614, 615, and 616 of the Mod Act amended §§ 508, 509, and 510 of the Tariff Act of 1930, as amended (19 U.S.C. 1508, 1509, and 1510) which pertain to recordkeeping requirements established for importers and others. Title II of the NAFTA Implementation Act, entitled "Customs Provisions", also amended §§ 508 and 509 of the Tariff Act of 1930, as amended, to include recordkeeping requirements for exportations to Canada and Mexico.

Part 162 of the Customs Regulations which addresses records, recordkeeping and its associated requirements also covers unrelated subjects. Because of the enhanced importance of recordkeeping, Customs believes that a new part devoted solely to this subject is appropriate. Accordingly, Customs is proposing to create a new Part 163 regarding recordkeeping.

RECORDKEEPING REQUIREMENTS

Before its amendment by the Mod Act, § 508 of the Tariff Act of 1930 (19 U.S.C. 1508) limited recordkeeping requirements to any owner, importer, consignee, or agent thereof who imported, or knowingly caused to be imported any merchandise into the Customs territory of the United States. Section 614 of the Mod Act amended these requirements and expanded the parties subject to Customs recordkeeping requirements to include parties who file an entry or declaration, transport or store merchandise carried or held under bond, file drawback claims, or

cause an importation, or transportation or storage of merchandise carried or held under bond. Section 614 of the Mod Act further amended section 508 of the Tariff Act of 1930 to clarify that all parties who must keep records for Customs purposes are subject to recordkeeping requirements. The Mod Act further distinguished between those business, financial or other records that pertain to activities listed in section 508 of the Tariff Act and are maintained in the normal course of business and those that are identified as "(a)(1)(A) list" or entry records. As discussed more fully later in this document, these latter records are those which have been identified by Customs as being necessary for the entry of merchandise. The failure to maintain, or produce these records upon Customs demand could subject the responsible party to substantial administrative penalties.

Proposed § 163.2 sets forth the parties who are subject to recordkeeping requirements. It is noted that the parties who are required to maintain records for purposes of the U.S.-Canada Free Trade Agreement and NAFTA are set forth respectively in parts 10 and 181.

In § 163.2(a), a provision concerning recordkeeping requirements for records kept in the ordinary course of business is proposed to reflect the expanded parties to whom recordkeeping requirements extend. The proposed section provides that records are to be made and kept by such parties as carriers, cartmen, bonded warehouse proprietors, foreign trade zone operators and drawback claimants.

Because Customs recognizes that the likelihood it will require or request records from travelers regarding their baggage or oral declarations after they have physically cleared the Customs facility is extremely small except for large purchases, and because Customs does not wish to impose an unnecessary recordkeeping burden on the general public, Customs, in § 163.2(g), is proposing to not require that such travelers retain the documentation which supports their declaration when the merchandise acquired abroad is covered by the traveler's personal exemption or by a flat rate of duty (See, for example, subheadings 9804.00.65–9804.00.72, 9816.00.20 and 9816.00.40, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202), and part 148 of the Customs Regulations). However, such travelers while not being required to retain records for Customs purposes may deem it advisable to retain them for other personal reasons, such as insurance or warranty matters.

Section 163.4 of the proposed regulations provides that records relating to drawback be retained for a period of three years from the date the drawback claim is paid. Since entry records relating to the merchandise for which the drawback claim was paid must be kept for five years, it is possible that the total retention requirement could extend to eight years. All other records, except for packing lists, that relate to filing an entry or declaration, transporting or storing merchandise carried or held under bond, or causing an importation, transportation or storage of merchandise carried or held under bond into or from the Customs

territory of the U.S. are required to be kept for a five year period from the date of entry or exportation, or other activity, as appropriate. An exception from the normal retention period is made for packing lists because of the limited period in which information contained on those lists would be useful for either Customs or the importer.

The Mod Act also amended 19 U.S.C. 1508 to reflect the current electronic environment in which both Customs and the importing and exporting community operate and expanded the definition of "records" to include information and data maintained in the form of electronically generated or machine readable data. The proposed amendment reflects this expansion of the concept of what constitute "records" in § 163.1(a).

EXAMINATION OF RECORDS

The Mod Act granted Customs authority not to require the presentation of certain documentation or information at time of entry. These provisions will allow Customs and the importing community to reduce the documentation and information requirements at time of entry, thereby facilitating the entry process without jeopardizing Customs ability to obtain records from an importing party at a later date. However, in exchange for not requiring presentation of documents at the time of entry, Customs has the authority to require, after entry, the production of any entry records whose presentation may not have been requested at entry. Section 615 of the Mod Act amended § 509 of the Tariff Act of 1930 (19 U.S.C. 1509) to authorize Customs to examine any records which are required by law for the entry of merchandise, whether or not Customs required its presentation at the time of entry. Failure to maintain or produce requested entry documents may result in the imposition of substantial administrative penalties.

In the spirit of "informed compliance" and in fairness to those who may be required to produce records, the Act requires Customs to identify and make available to the importing community, by publication, a list of all records, statements, declarations or documents required by law or regulation for the entry of merchandise whose production may or may not have been requested at time of entry and for which substantial administrative penalties may be imposed for failure to maintain or produce for Customs within a reasonable time. This list of records has commonly been referred to as the "(a)(1)(A) list" because of the section of the Mod Act which contained the requirement. This list, which was published in the Customs Bulletin on January 3, 1996 (T.D. 96–1), and the Federal Register on July 15, 1996 (61 FR 36956) is included as an Appendix to part 163.

It should be noted that while the "(a)(1)(A) list" pertains to records or information required for the entry of merchandise, an owner, importer, consignee, importer of record, entry filer, or other party who imports merchandise, files a drawback claim, exports to a NAFTA country or transports or stores bonded merchandise is also required to make, keep and render for examination and inspection records (including, but not limited to, statements, declarations, documents and electronically gen-

erated or readable data) directly or indirectly pertaining to such activity or to the information contained in the records required by the Tariff Act of 1930, as amended, in connection with any such activity and which are normally kept in the ordinary course of business. Parties have the responsibility to maintain supporting records, documents, and information which will demonstrate that information on declarations regarding classification, valuation and rate of duty at entry, as well as all other data on entry records is accurate.

In the future, as Customs expands its electronic entry processes, presentation of certain supporting paper documentation for entries may be waived at the time of entry. However, importers shall be required to maintain such documentation subject to this part. Before Customs implements any new procedures which relate to the electronic entry of goods, a Notice of Proposed Rulemaking will be published in the Federal Register.

The present "(a)(1)(A) list" is based on existing entry requirements. It contains a list of records that are required for the entry of merchandise and that may be waived at the time of entry, but that must be produced for Customs examination upon demand. A party who fails to produce an "(a)(1)(A) list" record can be held liable for penalties under the provisions of the Mod Act. Customs will presently revise its processes relating to entry. It is expected that the "(a)(1)(A) list" will be extensively revised. The proposed regulations incorporate Customs authority to waive the presentation of certain documentation or information at the time of entry.

PENALTIES

The proposed regulations incorporate Customs authority to assess administrative penalties for failure to produce entry records for Customs examination within a reasonable time. In determining a reasonable time, Customs proposes to take into account the number, type, and age of the item asked to be produced. Included in the proposed regulation is a chart that is intended to provide general guidelines so the public will know the time frames within which Customs expects documents to be produced. It is expected that all parties will discuss the expected production date of any items Customs has requested when that item has been requested. It is also expected that any party anticipating difficulty in meeting the expected production date will immediately inform Customs of that difficulty. Parties who have been assessed administrative penalties for failure to produce demanded "(a)(1)(A) list" records will be able to petition for mitigation of the penalties under the provisions of part 171 of the Customs Regulations. In addition to administrative penalties, the Mod Act has granted courts the authority to impose monetary penalties for the failure to produce records summoned by Customs. These provisions are contained in § 163.12.

REQUESTS FOR PRODUCTION OF RECORDS, SUMMONS

The proposed regulations contain provisions in §§ 163.6 through 163.11 that are similar to existing regulations regarding Customs ability to request and summon records when audits, inquiries, reviews or investigations are being conducted or when such information is otherwise necessary to verify information submitted to Customs or to complete Customs processing of an entry. However, the regulations have been expanded to include additional parties who are subject to Customs summons authority.

REGULATORY AUDIT PROCEDURES

The proposed § 163.13 details the role and responsibility of Customs regulatory auditors and formally sets forth regulatory audit procedures for conducting a regulatory audit that have been in place by directive for several years. The regulations provide for time lines for conducting an audit as well issuance of audit reports.

RECORDKEEPING COMPLIANCE PROGRAM

The proposed regulations contain provisions that describe a voluntary recordkeeping compliance program available to all parties who are required to maintain and produce records under the Customs Regulations and are in compliance with Customs laws and regulations. Applicants to the program may have Customs review their recordkeeping procedures and methods. If Customs determines that the party meets the program requirements, Customs may certify that fact and permit him to participate in the program. To assist the public in meeting Customs recordkeeping requirements, Customs has prepared a Recordkeeping Compliance Handbook which can be obtained from the Customs Electronic Bulletin Board or by faxing or writing the Regulatory Audit Division, Miami Field Office. Refer to the beginning of this document for the address and/or fax number. Participants in the program are eligible for alternatives to penalties and may be entitled to greater mitigation of any recordkeeping penalty the party might be assessed should he be unable to produce a requested record. However, repeated or willful failure to produce records or failure to exercise reasonable care in the maintenance of records or be in compliance with the recordkeeping requirements may cause a party's removal from the program and subject him to penalties. The recordkeeping compliance program will also permit participants to receive approval of recordkeeping formats that are tailored to the needs of their operations or involve conversion of records from one format to another.

OTHER SECTIONS AFFECTED

In order to establish uniform recordkeeping requirements for parties who transact business with Customs in accordance with objectives of the Mod Act, the retention period for records relating to user fees for arrivals by railcar, which are contained in § 24.22(d)(5), and those for passengers aboard commercial vessels and commercial aircraft in

§ 24.22(g)(6) is being amended to the same five year period that other recordkeepers must observe.

However, it must be noted that while the regulations establish a minimum requirement for the maintenance for records, this does not preclude Customs auditors from examining fee remitters' records, if records exist, to determine whether fees are owed for periods prior to the record retention period. Under section 19 CFR 162.1d (proposed 163.6), and 19 U.S.C. 1508 and 1509, Customs officers currently have the authority to examine records to determine the liability of any person from whom duties, fees, and taxes are due, or that may be due, and to determine compliance with the laws or regulations enforced by the Customs Service. If a fee remitter refuses to supply records to verify user fees, the Customs Service has the authority to summon those records pursuant to 19 U.S.C. 1509 or, if Customs possesses information to determine fee payments, collection action may be initiated. It should be pointed out that there is no language in 19 U.S.C. 58c or in the current regulations or other Customs laws that limits the liability for fees owed to a particular period. All fee remitters are liable for fees that are accrued on or after the effective dates of the statutes enacting the fees. Statutory and regulatory requirements for keeping fee-related records are not equivalent to statutes of limitations on collecting fees.

The document also proposes to make several changes to parts 111 and 143. The reference to § 162.1a and § 162.1b in the definition of records in § 111.1(f) will be changed to § 163.1(a) and § 163.2. An addition is made to § 111.21 to add new paragraphs (b) and (c). Section 111.21(b) will require brokers to comply with the provisions of § 163 when maintaining records that reflect on their transactions as a broker. Section 111.21(c) will require brokers to designate a recordkeeping officer and also designate a back-up recordkeeping officer. A change is proposed to § 111.22(b),(c),(d), and (e) that will permit requests for exemptions for recordkeeping formats to be granted by the Field Director, Regulatory Audit responsible for the geographical area in which the designated broker's recordkeeping officer is located rather than requiring that the request be referred to port directors.

A change is being proposed to § 111.23(a)(1) that will permit brokers to consolidate all records they are required to maintain if their proposed consolidation plan is approved by the Field Director of Regulatory Audit who has responsibility for the geographical area in which the designated broker's recordkeeping officer is located. This potentially shortens the approval time by removing port directors from the review and approval process. The current regulations permit brokers to centralize only accounting records and requires they maintain entry records within the district to which they relate. Brokers will also be permitted to store powers of attorney in alternative formats, if such storage has been approved in accordance with Part 163. These proposed changes will give brokers more flexibility in their record maintenance options.

The document contains proposals to amend §§ 143.35 and 143.36 to reflect Customs present practice relating to the submission of paper documents when entries are transmitted electronically through the ACS system. As Customs and the business community proceed into the paperless, electronic operating environment it is anticipated that actual transfer of documentation will occur less frequently and usually only at Customs request. However, Customs decision not to request presentation or submission of documents at the time of entry does not relieve the filer from the responsibility of maintaining those documents or records in accordance with the provisions of this part.

Amendments to § 143.37 are also proposed. A new proposed section (a) will require all brokers and importers to maintain records in accordance with the new part 163. The proposed language means that hard copy or electronic documentation supporting electronic immediate delivery, entry, and entry summary must be retained in the condition as received by the filer or importer, unless the filer has received permission to store such documentation in accordance with § 163.5. This change establishes uniform procedures for storing records in alternative formats. It is also proposed that § 143.37(c) be amended to permit filers to consolidate and store records and electronic data in alternative formats if their proposed plan is approved by the Field Director, Regulatory Audit who has responsibility for the geographical area in which the designated broker's recordkeeping officer is situated. Appeals from the decision of the Field Director would be to the Director of the Regulatory Audit Division in Washington, DC. This eliminates the need to refer the request to the Assistant Commissioner, Field Operations, as the current regulations require.

Other language changes to § 143.37(c) are proposed. The term "centralized locations" is replaced with "consolidated locations". This proposed change is intended to give filers more flexibility in their record maintenance. Finally, § 143.39 is being amended to state that the failure to produce records in a timely manner could subject importers to penalties pursuant to part 163 and brokers to penalties pursuant to parts 111 and 163.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are timely submitted to Customs. All such comments received from the public pursuant to this notice of proposed rulemaking will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, 1099 14th Street, NW., Suite 4000, Washington, D.C.

REGULATORY FLEXIBILITY ACT

Insofar as the proposed regulation closely follows legislative direction, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendment, if adopted, will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12866

The proposed amendment does not meet the criteria for a "significant regulatory action" under E.O. 12866.

PAPERWORK REDUCTION ACT

The collection of information contained in this rulemaking has been submitted to the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995. (44 U.S.C. 3507).

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless the collection of information displays a valid control number.

The collection of information in these regulations is in §§ 163.2, 163.3 and 163.14. Although other parts of the Customs Regulations are being amended, all information required by this proposed amendment is contained or identified in the above-cited sections. This information is to be maintained in the form of records which are necessary to ensure that the Customs Service will be able to effectively administer the laws it is charged with enforcing while, at the same time, imposing a minimum burden on the public it is serving. Respondents or recordkeepers are already required by statute or regulation to maintain the vast majority of the information covered in this proposed regulation. The likely respondents or recordkeepers are business organizations including importers, exporters and manufacturers.

Estimated total annual reporting and/or recordkeeping burden: 732,600 hours.

Estimated average annual burden per respondent/recordkeeper: 117.2.

Estimated number of respondents and/or recordkeepers: 6250.

Estimated annual frequency of responses: 4.

Comments concerning the collections of information should be sent to the Office of Management and Budget, Attention: Desk Officer of the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503. A copy should also be sent to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Comments should be submitted within the time frame that comments are due regarding the substance of the proposal.

Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the ac-

curacy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DRAFTING INFORMATION

The principal authors of this document are Peter T. Lynch, Regulations Branch, Office of Regulations and Rulings and Cindy Covell, Regulatory Audit Division, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 24

Accounting, Customs duties and inspection, Reporting and recordkeeping requirements, Harbors, Taxes.

19 CFR Part 111

Administrative practice and procedures, Customs duties and inspection, Brokers, Reporting and recordkeeping requirements, Penalties.

19 CFR Part 143

Customs duties and inspection, Reporting and recordkeeping requirements.

19 CFR Part 162

Administrative practice and procedure, Customs duties and inspection, Recordkeeping and reporting requirements, Trade agreements.

19 CFR Part 163

Administrative practice and procedure, Customs duties and inspection, Recordkeeping and reporting requirements, Trade agreements.

PROPOSED AMENDMENTS TO THE REGULATIONS

It is proposed to amend Chapter I of Title 19, Code of Federal Regulations (19 CFR Chapter I) by amending parts 24, 111, 143 and 162, and by adding a new part 163 to read as follows:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The general authority citation for Part 24 continues to read in part as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 58a–58c, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624; 31 U.S.C. 9701.

* * * * * * *

2. It is proposed to amend § 24.22(d)(5) by removing the phrase "shall be maintained for a period of 3 years" and adding, in its place, the phrase "shall be maintained in the United States for a period of 5 years".

3. It is proposed to amend § 24.22(g)(6) by removing the phrase "shall be maintained for a period of 2 years" and adding, in its place, the phrase "shall be maintained in the United States for a period of 5 years".

PART 111—CUSTOMS BROKERS

1. The general authority citation for Part 111 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20 Harmonized Tariff Schedule of the United States), 1624, 1641.

* * * * * * *

2. In § 111.1, it is proposed to remove the section references "§ 162.1a" and "§ 162.1b" in the definition of *"Records"* and add, in their place, respectively, the following section references: "§ 163.1a" and "§ 163.2".

3. Section 111.21 is proposed to be amended by designating the existing paragraph as paragraph (a) and adding new paragraphs (b) and (c) to read as follows:

§ 111.21 Record of transactions.

(a) * * *

(b) Each broker shall comply with the provisions of part 163 of this chapter when maintaining records that reflect on his transactions as a broker.

(c) Each broker will designate a knowledgeable company employee to be the broker's recordkeeping officer as well as a back-up recordkeeping officer for broker-wide entry and financial recordkeeping requirements.

4. Section 111.22 is proposed to be amended by removing the titles of "port director" and "director of the port" and adding, in their place, the phrase, "Field Director of Regulatory Audit responsible for the geographical area in which the broker's designated recordkeeping officer is located."

5. Section 111.23 is proposed to be amended by revising paragraphs (a)(1) and (b) to read as follows, by removing paragraphs (c) and (d), and by redesignating paragraph (e) as paragraph (c) and revising it by removing the word "centralized" and adding the word "consolidated" each time it appears, and by removing the words "office of Field Operations, Headquarters" and adding the words "Field Director, Regulatory Audit Division responsible for the geographic area in which the broker's designated recordkeeping officer is located" in its place.

§ 111.23 Retention of records.

(a) *Place and period of retention.*—(1) *Place.* The records, as defined in § 111.1(f), and required by § 111.21 and § 111.22 to be kept by the broker, shall be retained within the broker district that covers the Customs port to which they relate unless approval for consolidation of records by the broker has been received from the Field Director of Regulatory Audit responsible for the geographical area in which the

broker's designated recordkeeping officer is located. Appeals from a denial of consolidation privileges shall be filed with the Director, Regulatory Audit Division, U.S. Customs Service, Washington, DC 20229 within 30 days from the mailing of the Field Director's decision.

* * * * * * *

(b) *Maintenance of records.* All records must be maintained in accordance with standards set forth in part 163 of this chapter.

* * * * * * *

PART 143—SPECIAL ENTRY PROCEDURES

1. The general authority citation for part 143 continues to read as follows:

Authority: 19 U.S.C. 66, 1481, 1484, 1498, 1624.

2. Section 143.31 is proposed to be amended by removing the reference to § 162.1a(a) in paragraph (n) and replacing it with "Part 163".

3. Section 143.35 is proposed to be revised to read as follows:

§ 143.35 Procedure for electronic entry summary.

In order to obtain entry summary processing electronically, the filer will submit certified entry summary data electronically through ABI. Data will be validated and, if found error-free, will be accepted. If it is determined through selectivity criteria and review of data that documentation is required for further processing of the entry summary, Customs will so notify the filer. Documentation submitted before being requested by Customs will not be accepted or retained by Customs. The entry summary will be scheduled for liquidation once payment is made under statement processing (see § 24.25 of this chapter).

4. Section 143.46 is proposed to be amended by revising the first sentence of paragraph (a), and the first sentence of paragraph (c) to read as follows:

§ 143.36 Forms of Immediate delivery, entry and entry summary.

(a) *Electronic form of data.* If Customs determines that the immediate delivery, entry or entry summary data is satisfactory under §§ 143.34 and 143.35, the electronic form of the immediate delivery, entry or entry summary through ABI shall be deemed to satisfy all filing requirements under this part. * * *

(b) * * *

(c) *Submission of invoice.* The invoice will be retained by the filer unless requested by Customs. If the invoice is submitted by the filer before a request is made by Customs, it will not be accepted or retained by Customs. When Customs requests presentation of the invoice, invoice data must be submitted in one of the following forms:

* * * * * * *

5. Section 143.37(a) is proposed to be revised to read as follows:

§ 143.37 Retention of records.

(a) *Record maintenance requirements.* All records received or generated by a broker or importer must be maintained in accordance with part 163 of this chapter.

* * * * * * *

6. In § 143.37, paragraph (c) is proposed to be amended by removing the words "Assistant Commissioner, Field Operations, U.S. Customs Service, Washington, D.C." and adding the phrase "Field Director, Regulatory Audit Division responsible for the geographical area in which the broker's designated recordkeeping officer is located for consolidation of entry and/or financial records by the broker" in its place and removing the word "centralized" wherever it appears and replacing it with the word "consolidated".

7. Section 143.37(d) is proposed to be amended by removing the title "Assistant Commissioner, Field Operations" each time it appears and adding in its place, the title "Director, Regulatory Audit Division".

8. Section 143.39 is proposed to be revised to read as follows:

§ 143.39 Penalties.

(a) *Brokers.* Brokers unable to produce documents requested by Customs within a reasonable time will be subject to penalties pursuant to parts 111 and/or 163 of this chapter.

(b) *Importers.* Importers unable to produce documents requested by Customs within a reasonable time will be subject to penalties pursuant to part 163 of this chapter.

PART 162—INSPECTION, SEARCH, AND SEIZURE

1. The authority citation for Part 162 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624.

* * * * * * *

2. The heading of Part 162 is proposed to be revised to read asset forth above.

3. Section 162.0 is proposed to be revised to read as follows:

§ 162.0 Scope.

This part contains provisions for the inspection, examination, and search of persons, vessels, aircraft, vehicles, and merchandise involved in importation, for the seizure of property, and for the forfeiture and sale of seized property. It also contains provisions for Customs enforcement of the controlled substances, narcotics and marihuana laws. Provisions relating to petitions for remission or mitigation of fines, penalties, and forfeitures incurred are contained in part 171 of this chapter.

4. In Subpart A, the Subpart heading is proposed to be revised to read as follows:

Subpart A—Inspection, Examination, and Search

5. In Subpart A, §§ 162.1a through 162.1i are proposed to be removed.

6. Part 163 is proposed to be added to read as follows:

PART 163—RECORDKEEPING

Sec.

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1508, 1509, 1510, 1624.

§ 163.0 Scope.

This part sets forth the recordkeeping requirements and procedures governing the maintenance, production, and examination of records. It also sets forth the procedures governing the examination of persons in connection with any audit, compliance assessment or other inquiry or investigation conducted for the purposes of ascertaining the correctness of any entry, for determining the liability of any person for duties, fees and taxes due or that may be due, for determining liability for fines, penalties and forfeitures, or for insuring compliance with the laws and regulations administered or enforced by Customs. Additional provisions concerning records maintenance and examination applicable to U.S. importers, exporters, and producers under the U.S. Canada Free Trade Agreement and the North American Free Trade Agreement are contained in parts 10 and 181 of this chapter, respectively.

§ 163.1 Definitions.

When used in this part, the following terms shall have the meaning indicated:

(a) *Records*. The term "records" means any information made or kept in the ordinary course of business that pertain directly or indirectly to the activities listed in paragraph (a)(1) of this section. Further, the term includes any information required for the entry of merchandise (the "(a)(1)(A) List") and other information pertaining directly or indirectly to any information element set forth in a collection of information required by the Tariff Act of 1930, as amended, in connection with any activity listed in paragraph (a)(1) of this section.

(1) *Activities.* The following are activities for purposes of the definition of "records" in paragraph (a) of this section:

(i) any importation, declaration or entry;

(ii) the transportation or storage of merchandise carried or held under bond into or from the customs territory of the United States;

(iii) the filing of a drawback claim;

(iv) any exportation to a NAFTA country;

(v) the collection or payment of fees and taxes to Customs; or

(vi) any other activity required to be undertaken pursuant to the laws or regulations administered by the Customs Service.

(2) *Examples.* Examples of information which are considered records include but are not limited to: statements, declarations, documents or electronically generated or machine readable data, books, papers, correspondence, accounts, financial accounting data, technical data, computer programs necessary to retrieve information in a usable form, and entry records (contained on the "(a)(1)(A)" list).

(b) *"(a)(1)(A) list".* See Entry Records.

(c) *Audit.* "Audit" means a Customs regulatory audit verification of records and other information required to be maintained and produced by parties listed in § 163.2 or other applicable laws and regulations administered by the Customs Service. The purpose of an audit is to determine that information submitted or required is accurate, complete and in accordance with laws and regulations administered by the Customs Service.

(d) *Certified Recordkeeper.* A "Certified Recordkeeper" is a party, required to keep and maintain records, who is the primary responsible participant of a Customs approved recordkeeping compliance agreement in accordance with § 163.14. An agent may not be a certified recordkeeper unless the agent is the importer of record and meets the requirements of § 163.14; however a Customs broker may be a certified recordkeeper's agent in its own name and on its own account for records required by §111.21 without client participation. The parties who are certified by Customs as participants in a recordkeeping compliance program with Customs will consist of the following: Customs and a certified recordkeeper, or Customs and a certified recordkeeper and its certified recordkeeping agent, or Customs and a Customs broker who requests certification in its own name and on its own account.

(e) *Certified Recordkeeper's Agent.* A "Certified Recordkeeper's Agent" is a party, other than a certified recordkeeper, who will keep and maintain records on behalf of a certified recordkeeper, pursuant to a Customs approved agreement, subject to the provisions of § 163.14.

(f) *Compliance assessment.* A "compliance assessment" is the first phase of an audit. During this phase, Customs officers review, examine and test samples of an auditee's documentation (records normally kept in the ordinary course of business that support statements and declarations made to Customs), internal controls, operations, and procedures to ensure compliance with laws and regulations administered by Cus-

toms. The completion of a compliance assessment does not necessarily mandate that a detailed audit be performed. However, if a compliance assessment is expanded, auditors will conduct detailed audit steps to further examine non-compliant practices, to identify causes, effects, and necessary corrective action, to implement corrective action plans and to conduct follow-up of corrective actions.

(g) *Entry records/"(a)(1)(A)list"*. The terms "entry records" and "(a)(1)(A) list" refer to records or information required by law or regulation for the entry of merchandise (whether or not Customs required its presentation at the time of entry). The "(a)(1)(A) list" is contained in the Appendix.

(h) *Original records/information*. The terms "original records" or "original information" mean paper documents or electronic data retained in the condition they were received by the party responsible for maintaining records pursuant to 19 U.S.C. 1508. Electronic information which was used to develop paper documents will be considered the original record/information. Original electronic information or paper documents must be provided to Customs within a reasonable time if requested or demanded pursuant to § 163.6. Electronic information shall be provided to Customs officials in a readable format such as in a facsimile paper format or an electronic or hardcopy spreadsheet. If a paper record or document is part of a multi-part form where all copies are made by the same impression, a carbon-copy original form, a facsimile copy, or a photocopy of the original will be acceptable. When an original record or document is provided to another government agency which retains it, a certified copy will be acceptable, and penalties will not be assessed for not having the original information/records in accordance with § 163.6. When requested by Customs, a signed statement shall accompany the copy certifying it to be a true copy of the original record or document.

(i) *Summons*. "Summons" means any summons issued that requires either the production of records or the giving of testimony, or both.

(j) *Technical data*. "Technical data" are records which include diagrams, and other data with regard to a business or an engineering or exploration operation, whether conducted inside or outside the United States, and whether on paper, cards, photographs, blueprints, tapes, microfiche, film, magnetic storage or other media.

(k) *Third-party recordkeeper*. "Third-party recordkeeper" means any attorney, any accountant or any Customs broker unless such Customs broker is the importer of record on an entry.

§ 163.2 Parties required to maintain records.

(a) *Recordkeeping required*. The following parties shall make, keep, and render for examination and inspection such records as defined in § 163.1(a):

(1) An owner, importer, consignee, importer of record, entry filer, or other party who—

(i) imports merchandise into the customs territory of the United States, files a drawback claim, or transports or stores merchandise carried or held under bond, or

(ii) knowingly causes the importation or transportation or storage of merchandise carried or held under bond into or from the customs territory of the United States;

(2) An agent of any party described in paragraph (a)(1); or

(3) A person whose activities require the filing of a declaration or entry, or both.

(b) *Domestic transaction excluded.* A person ordering merchandise from an importer in a domestic transaction who does not knowingly cause merchandise to be imported is not required to make and keep records unless:

(1) The terms and conditions of the importation are controlled by the person placing the order with the importer (e.g., the importer is not an independent contractor but the agent of the person placing the order. For example: The average consumer who purchases an imported automobile would not be required to maintain records, but a transit authority that prepared detailed specifications from which imported subway cars or busses were manufactured would be required to maintain records); or

(2) Technical data, molds, equipment, other production assistance, material, components, or parts are furnished by the person placing the order with the importer with knowledge that they will be used in the manufacture or production of the imported merchandise.

(c) *Recordkeeping required for exporters.* Any party that exports to Canada or Mexico pursuant to the North American Free Trade Agreement must maintain records in accordance with the regulations as set forth in part 181 of this chapter.

(d) *Recordkeeping required for Customs brokers.* Each Customs broker shall maintain and produce records in accordance with parts 111 and 163 of this chapter.

(e) *Recordkeeping required for parties filing drawback claims.* A party filing a drawback claim shall make, keep and render for examination records required by the Customs Regulations and other records which pertain to that activity and are ordinarily kept in the normal course of business.

(f) *Recordkeeping required for other activities.* Each party who transports or stores merchandise carried or held under bond into or from the customs territory of the United States shall make, keep and render for examination records which pertain to such Customs activity and are ordinarily kept in the normal course of business or are required by law or regulation for the entry of merchandise.

(g) *Recordkeeping required for travelers.* After having physically cleared the Customs facility, a traveler who made a baggage or oral declaration upon arrival in the United States will not be required to maintain supporting records regarding non-commercial merchandise

acquired abroad which falls within the traveler's personal exemptions or which is covered by a flat rate of duty.

§ 163.3 Entry records.

Any party described in § 163.2(a) in connection with an import transaction shall be prepared to produce or transmit to Customs within a reasonable time after demand any records which are required by law or regulation for the entry of merchandise ("(a)(1)(A) list"). If the records are returned by Customs, or production at the time of entry is waived by Customs, the party shall retain such records. Copies of records which are kept ordinarily in the normal course of business, must be retained whether or not a copy is retained by Customs. In any situation, the responsible party shall, upon demand by Customs, taking into consideration the number, type, and age of the items demanded, produce such records within a reasonable time. (See § 163.6.)

§ 163.4 Record retention period.

(a) *General rule.* Any record required to be made, kept, and rendered for examination and inspection by Customs under § 163.2 shall be kept for 5 years from the date of entry, if the record relates to an entry, or 5 years from the date of the activity which required creation of the record unless excepted pursuant to paragraph (b) of this section.

(b) *Exceptions.*

(1) Any record relating to a drawback claim shall be kept until the third anniversary of the date of payment of the claim.

(2) Packing Lists shall be retained for a period of 60 days from the end of the release or conditional release period, or, if a demand for recall has been issued, for a period of 60 days from the date the goods are redelivered, or by the date specified in the notice as the latest redelivery date.

(3) If another regulation in this chapter specifies a different record retention period than this section for a specific type of record, the other regulation controls.

§ 163.5 Methods of storage for records.

(a) *Original Records/Information.* All parties listed in § 163.2 must maintain all records required by law and regulation for the required retention periods, in the original formats as defined in § 163.1(h), whether paper or electronic, unless alternative storage methods have been approved in writing by the director of the regulatory audit field office who has responsibility for the geographical area in which the designated requestor's recordkeeping officer resides. The records must be capable of being retreived upon lawful request or demand by Customs.

(b) *Approval for alternative method of storage.* Any of the parties listed in § 163.2 may request Customs approval to maintain any records in an alternative format by writing to the director of the regulatory audit field office who has audit oversight responsibility for the geographical area in which the designated requestor's recordkeeping officer resides and describing the proposed system of storage, the conversion techniques to be used and the security safeguards that will be employed

to prevent alteration. If the applicable director of the regulatory audit field office is satisfied that the alternative methods proposed by the recordkeeper will insure the accuracy and availability of the records when required, written approval will be granted.

(c) *Standards for alternative storage methods.* Among methods commonly used in standard business practice for storage of records are: Machine readable data, CD ROM, and Microfiche. Methods that are in compliance with generally accepted business standards will generally satisfy Customs requirements provided that the method used is capable of retrieving records requested within a reasonable time after the request and that adequate provisions exist to prevent alteration, destruction, or deterioration of the records. The following are minimum standards that will be considered by Customs in evaluating proposals for alternative storage methods:

(1) A responsible and knowledgeable recordkeeping officer and a back up officer are designated to be accountable for the alternative storage of records;

(2) Operational and written procedures are in place to ensure that the imaging and/or other media storage process preserves the integrity, readability, and security of the original records. Procedures must also indicate and it must be certified (i) that documents that are required by other Federal or state agencies and that are similar to Customs records, are created and stored by the same procedures and (ii) that there is a standardized retrieval process for such records. Additionally, written procedures must document the electronic media used to store records and the life cycle and disposition procedures.

(3) The medium to which the transfer will occur is shown to be reliable. (Vendor specifications/documentation and benchmark data must be available for Customs review.)

(4) The data retention and transfer procedures are documented and provide reasonable assurance that the integrity, reliability, and security of the original data will be maintained. Procedures must include descriptions of authorized personnel access processes and back up and recovery systems.

(5) There is an audit trail describing the data transfer.

(6) The medium cannot be destroyed, discarded, or written over. The recordkeeper, after appropriate transition, and exception-reporting/testing of accuracy and readability of information, will transfer all information to non-erasable storage.

(7) The transfer process includes all relevant notes, worksheets, and other papers necessary for reconstructing or understanding the records (this also includes appropriate back-up procedures).

(8) There is an effective labeling, naming, filing, and indexing system that will permit easy retrieval in a timely fashion of records/information. Any indices, registers, or other finding aids shall be at the beginning of the records to which they relate unless alternative indexing is specifically authorized.

(9) There are adequate internal control systems, including segregation of duties, particularly between those responsible for maintaining and producing the original records and those responsible for the transfer process.

(10) All original records must be maintained for a minimum of one year after the date of transfer and internal sampling-exception-reporting/testing of accuracy and readability must be performed on a quarterly basis. No original records will be destroyed after a year unless there is acceptable proof that records/information are being accurately transferred.

(11) There is a system of continuing surveillance over the medium transfer system. Files of all internal reviews will be made available to Customs within a reasonable time after demand is made and retained for five years from the date of entry or the activity unless maintenance of records is required for another time period.

(12) There are procedures for preventing the destruction of any hard copy records that are required to be maintained by existing laws or regulations.

(13) All parties listed in § 163.2 who requested and were granted permission to use alternative storage methods shall have the capability to make hardcopy reproductions of alternatively stored records. Parties shall bear the expense of the cost of making hardcopy reproductions of any or all alternatively stored records required by proper Customs officials for audit, inquiry, investigation, or inspection of such records/information.

(d) *Retention of records*. All parties listed in § 163.2 who requested and were granted permission to use alternative storage methods shall retain and keep available two copies of the records/information on approved media at different locations for the periods specified in § 163.4.

(e) *Retrievability of records*. All parties listed in § 163.2 who requested and were granted permission to use alternative storage methods shall produce records as specified by § 163.6. A certified hardcopy may be used when information is received and stored electronically for Customs requests for information. Records shall be kept of the frequency and to whom copies of the records were given.

(f) *Changes to alternate storage procedures*. No changes to alternate recordkeeping procedures may be made without the approval of the appropriate Field Director, Regulatory Audit.

(g) *Notification of non-compliance*. Notification of non-compliance with the agreed upon alternative storage methods must made within 10 business days to the applicable Field Director, Regulatory Audit. Notification must be in writing and it must detail what corrective action will take place.

(h) *Penalties*. All parties listed in § 163.2 of this part who requested and were granted permission to use alternative storage methods who fail to maintain or produce records in a reasonable time period shall be subject to penalties pursuant to § 163.6 for (a)(1)(A) records, and sanc-

tions pursuant to §§ 163.11 and 163.12 for other records, and will have their alternative storage privileges revoked immediately by written notice.

(i) *Revocation of privilege to maintain alternative records.* All parties listed in § 163.2 who requested and were granted permission to use alternative storage methods and who fail to meet regulatory conditions and requirements shall, upon written notice, have the privilege revoked by the applicable regulatory audit field office director. The revocation shall be effective on the date of issuance of the written notice and shall remain in effect pending any appeal. Revocation requires the party immediately to begin to maintain original records and subjects them to penalties provided for in § 163.6 for failure to do so.

(j) *Appeal procedures for denial of alternate storage method or revocation action taken.* The denial of any proposed alternate method for the storage of records required to be maintained or any revocation of the privilege to store records in alternative formats by this part may be appealed. Any appeal of such denial or revocation shall be in writing and directed to the Director, Regulatory Audit Division, Office of Strategic Trade, U.S. Customs Service, Washington, DC 20229. Appeals shall be filed within 30 days from the mailing of the Field Director's decision.

§ 163.6 Notices for production and examination of records and witnesses; penalties.

(a) *Production of entry records.* Upon written, oral, or electronic notice, Customs may require the production of records required by law or regulation for the entry of merchandise, whether or not presentation was requested at the time of entry. Any oral request for records will be followed by a written request. The records shall be produced timely taking into consideration the number, type, and age of the item demanded. In order to provide the public with general guidelines of the time frames within which Customs expects parties to produce requested records, the following table shows various ages of records and the maximum length of time Customs expects to wait for their production. Should any recordkeeper from whom Customs has requested records foresee the inability to comply with the given time periods, Customs expects that they will immediately notify Customs, provide an explanation for the inability to meet the deadline, and provide Customs with a date on which the records will be produced.

Age of entry/entry summary	*Maximum period for production of records (Business days)*
1 day to 1 month	5 days
1 month to 6 months	10 days
6 months to 1 year	15 days
1 year to 3 years	20 days
3 years to 5 years	30 days

(2) If the request includes records previously requested by Customs and provided to a Customs officer, the recordkeeper will provide the following information concerning the record: a copy of the Customs notice letter which originally requested the record, the date the record was provided to Customs, and the name and address of the person to whom the record was provided.

(b) *Nonproduction of entry records.*—(1) *Penalties applicable for failure to maintain or produce entry records.* If the record Customs wishes to have produced is required by law or regulation for the entry of merchandise, the following penalties may be imposed if a person described in § 163.2(a) fails to comply with a lawful demand for the record and is not excused from a penalty in accordance with paragraph (b)(2) of this section:

(i) If the failure to comply is a result of the willful failure of the person to maintain, store, or retrieve the demanded record, such person shall be subject to a penalty for each release of merchandise not to exceed $100,000, or an amount equal to 75 percent of the appraised value of the merchandise, whichever amount is less.

(ii) If the failure to comply is a result of negligence of the person in maintaining, storing, or retrieving the demanded information, such person shall be subject to a penalty, for each release of merchandise, not to exceed $10,000, or an amount equal to 40 percent of the appraised value of the merchandise, whichever amount is less.

(2) *Additional actions.* In addition to any penalty imposed under paragraph (b)(1)(i) and (b)(1)(ii) of this section, regarding demanded records, if the demanded record relates to the eligibility of merchandise for a column 1 special rate of duty in the Harmonized Tariff Schedule of the United States, the entry of such merchandise, unless subject to the exception in paragraph (b)(3) of this section:

(i) If unliquidated, shall be liquidated at the applicable column 1 general rate of duty; or

(ii) If liquidated within the 2-year period preceding the date of the demand, shall be reliquidated, notwithstanding the time limitation in 19 U.S.C. 1514 or 1520, at the applicable column 1 general rate of duty;

(3) *Exceptions.* Any liquidation or reliquidation under paragraph (b)(2)(i) or (b)(2)(ii) of this section shall be at the applicable column 2 rate of duty if the Customs Service demonstrates that the merchandise should be dutiable at such rate.

(4) *Avoidance of penalties for failure to maintain or produce entry records.* No penalty may be assessed under paragraph (b)(1) of this section if the person described in § 163.2(a) who fails to comply with a lawful demand for entry records can show:

(i) That the loss of the demanded information was the result of an act of God or other natural casualty or disaster beyond the fault of such person or an agent of the person;

(ii) On the basis of other evidence satisfactory to Customs, that the demand was substantially complied with;

(iii) That the information demanded was presented to and retained by the Customs Service at the time of entry or submitted in response to an earlier demand; or

(iv) that he is a participant in the recordkeeping compliance program (see § 163.14(b)(1)) and that this is his first violation and that it is a nonwillful violation.

(5) *Penalties for failure to maintain or produce entry records not exclusive.* Any penalty imposed under paragraph (b)(1) of this section shall be in addition to any other penalty provided by law except for:

(i) A penalty imposed under 19 U.S.C. 1592 for a material omission of the demanded information, or

(ii) Disciplinary action taken under 19 U.S.C. 1641.

(6) *Remission or mitigation of penalties for failure to maintain or produce entry records.* A penalty imposed under this section may be remitted or mitigated under 19 U.S.C. 1618.

(7) *Customs summons.* In addition to assessing penalties, Customs may issue a summons, pursuant to § 163.7 or seek its enforcement, pursuant to §§ 163.11–163.12, to compel the furnishing of any records required by law or regulation for the entry of merchandise.

(c) *Examination of records.*—(1) *Reasons for.* Customs may initiate an inquiry, audit, compliance assessment or investigation to:

(i) Determine the correctness of any entry, the liability of duties, taxes and fees due or which may be due, or any liability for fines, penalties and forfeitures; or

(ii) Insure compliance with the laws and regulations administered or enforced by the Customs Service.

(2) *Availability of records.* During the course of any inquiry, audit, compliance assessment or investigation, a Customs officer, during normal business hours, and to the extent possible, at a time mutually convenient to the parties, may examine or cause to be examined, any relevant records, statements, declarations, or other documents by providing the person responsible for such records with notice, either electronically, orally or in writing, that describes the records with reasonable specificity.

(3) *Examination notice not exclusive.* In addition to, or in lieu of, issuing an examination notice under this section, Customs may issue a summons pursuant to § 163.7 and seek its enforcement, pursuant to §§ 163.11 and 163.12, to compel the furnishing of any records required by law or regulation.

§ 163.7 Summons.

(a) *Who may be served.* During the course of any inquiry, audit, compliance assessment, or investigation initiated for the reasons set forth in § 163.6, the Commissioner of Customs or his designee, but no designee of the Commissioner below the rank of port director, regulatory audit field director, or special agent in charge, may, upon reasonable notice, issue a summons requiring certain persons to produce records

or to give testimony or both. Such summons may be issued to any person who:

(1) Imported or knowingly caused to be imported merchandise into the customs territory of the United States;

(2) Exported merchandise or knowingly caused merchandise to be exported to Canada or Mexico pursuant to the North American Free Trade Agreement Implementation Act (19 U.S.C. 3301(4)), or to Canada during such time as the United States-Canada Free Trade Agreement was in force with respect to, and the United States applied that Agreement to, Canada;

(3) Transported, or stored merchandise that was or is carried or held under customs bond, or knowingly caused such transportation or storage;

(4) Filed a declaration, entry, or drawback claim with the Customs Service;

(5) Is an officer, employee, or agent of any person described in this paragraph; or

(6) Had possession, custody or care of records related to the importation or other activity described in this paragraph or;

(7) Customs otherwise deems proper.

(b) *Transcript of testimony under oath.* Testimony of any person taken pursuant to a summons may be taken under oath and when so taken shall be transcribed. When testimony is transcribed, a copy shall be made available on request to the witness unless for good cause shown the issuing officer determines under 5 U.S.C. 555 that a copy should not be provided. In that event, the witness shall be limited to inspection of the official transcript of the testimony. The testimony or transcript may be in the form of a written statement under oath provided by the person examined at the request of the Customs officer.

§ 163.8 Contents of summons.

(a) *Summons for person.* Any summons issued under § 163.7 to compel appearance shall state:

(1) The name, title, and telephone number of the Customs officer before whom the appearance shall take place;

(2) The address where the person shall appear, not to exceed 100 miles from the place where the summons was served;

(3) The time of appearance; and

(4) The name, address, and telephone number of the Customs officer issuing the summons.

(b) *Summons of records.* If the summons requires the production of records, the summons, in addition to containing the information required by paragraph (a) of this section, shall describe the records with reasonable specificity.

§ 163.9 Service of summons.

(a) *Who may serve.* Any Customs officer is authorized to serve a summons issued under § 163.7.

(b) *Method of service.*

(1) *Natural person.* Service upon a natural person shall be made by personal delivery.

(2) *Corporation, partnership, or association.* Service shall be made upon a domestic or foreign corporation, or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivery to an officer, managing or general agent, or any other agent authorized by appointment or law to receive service of process.

(c) *Certificate of service.* On the hearing of an application for the enforcement of a summons, the certificate of service signed by the person serving the summons is prima facie evidence of the facts it states.

§ 163.10 Third-party recordkeeper.

(a) *Notice.* Except as provided by paragraph (f) of this section, if a summons issued under § 163.7 to a third-party recordkeeper requires the production of records or testimony relating to transactions of any person other than the person summoned, and the person is identified in the description of the records in the summons, notice of the summons shall be provided to the person identified in the description of the records contained in the summons.

(b) *Time of notice.* Notice of service of summons required by paragraph (a) of this section should be provided by the issuing officer immediately after service of summons is obtained under § 163.9, but in no event shall notice be given less than 10 business days before the date set in the summons for the examination of records or persons.

(c) *Contents of notice.* The issuing officer shall insure that any notice issued under this section includes a copy of the summons and contains the following information:

(1) That compliance with the summons may be stayed if written direction is given by the person receiving notice to the person summoned not to comply with the summons;

(2) That a copy of the direction not to comply and a copy of the summons shall be mailed by registered or certified mail to the person summoned at the addresses in the summons and to the issuing Customs officer; and

(3) That the actions under paragraphs (c)(1) and (c)(2) of this section shall be accomplished not later than the day before the day fixed in the summons as the day upon which the records are to be examined or testimony given.

(d) *Service of notice.* The issuing officer shall serve the notice required by paragraph (a) of this section in the same manner as is prescribed in § 163.9 for the service of a summons, or by certified or registered mail to the last known address of the person entitled to notice.

(e) *Examination precluded.* If notice is required by this section, no record may be examined and no testimony may be taken before the date fixed in the summons as the date to examine the records or to take the testimony. If the owner, importer, consignee, or their agent, or any other person concerned issues a stay of the summons, no examination shall

take place, and no testimony shall be taken, without the consent of the person staying compliance, or without an order issued by a U.S. district court.

(f) *Exceptions to notice.*—(1) *Personal liability for duties, fees and taxes.* This section does not apply to any summons served on the person, or any officer or employee of the person, with respect to whose liability for duties, fees, and taxes the summons is issued.

(2) *Verification.* This section does not apply to any summons issued to determine whether or not records of the transactions of an identified person have been made or kept.

(3) *Court order.* Notice shall not be given if a U.S. district court determines, upon petition by the issuing Customs officer, that reasonable cause exists to believe giving notice may lead to an attempt:

(i) To conceal, destroy, or alter relevant records;

(ii) To prevent the communication of information from other persons through intimidation, bribery, or collusion; or,

(iii) To flee to avoid prosecution, testifying, or production of records.

§ 163.11 Enforcement of summons.

Whenever any person does not comply with a summons issued under § 163.7, the issuing officer may request the appropriate U.S. attorney to seek an order requiring compliance from the U.S. district court for the district in which the person is found or resides or is doing business.

§ 163.12 Failure to comply with court order; Penalties.

(a) *Monetary Penalties.* The U.S. district court of the United States for any district in which a party who has been served with a Customs summons is found or resides or is doing business may order a party to comply with the summons. Upon the failure of a party to obey a court order to comply with a Customs summons, the court may find such party in contempt, assess a monetary penalty, or do both.

(b) *Importations prohibited.* If a person fails to comply with a court order enforcing the summons and is adjudged guilty of contempt, the Commissioner of Customs, with the approval of the Secretary of the Treasury, for so long as that person remains in contempt:

(1) May prohibit importation of merchandise by that person, directly or indirectly, or for that person's account; and

(2) May withhold delivery of merchandise imported by that person, directly, or indirectly, or for that person's account.

(c) *Sale of merchandise.* If any person remains in contempt for more than 1 year after the Commissioner issues instructions to withhold delivery, the merchandise shall be considered abandoned, and shall be sold at public auction or otherwise disposed of in accordance with Subpart E of part 162.

§ 163.13 Regulatory audit procedures.

(a) *Conduct of a Customs regulatory audit.* In conducting an audit under this section (which does not include a quantity verification for a customs bonded warehouse or general purpose foreign trade zone or an

inquiry), Customs auditors, except as provided in paragraph (b) of this section, shall:

(1) Provide notice, telephonically and in writing, to the person being audited, in advance of the audit with a reasonable estimate of the time required for the audit;

(2) Inform the party to be audited, in writing, before commencing an audit, of his right to an entrance conference at which time the purpose of the audit and the estimated termination date would be given;

(3) Provide a further estimate of such additional time if in the course of an audit it becomes apparent that additional time will be required;

(4) Schedule a compliance assessment (first phase of an audit) closing conference upon completion of the assessment to explain the preliminary results of the assessment;

(5) Write a compliance assessment report if, after the assessment, it is determined that no audit will be performed and all on-site work will end;

(6) At the conclusion of the compliance assessment, if it is determined that an audit is warranted, schedule and hold an audit entrance conference to explain the objectives, records requirements, and time required. If it is decided that an audit will be conducted, it will not be necessary for a formal compliance assessment report to be prepared for the party being audited;

(7) Schedule a closing conference to explain preliminary results of the audit upon completion of the audit field work;

(8) Complete the formal written audit report within 90 days following the closing conference, provided paragraph (b) of this section is not applicable, unless the Director, Regulatory Audit Division, at Customs Headquarters provides written notice to the person being audited of the reason for any delay and the anticipated completion date; and

(9) After application of any exception contained in 5 U.S.C. 552, send a copy of the formal written audit report to the person audited within 30 days following completion of the report unless a formal investigation has commenced. All pertinent details should be explained at the compliance assessment closing conference and reiterated in the final audit report.

(b) *Exception to procedures.* Paragraphs (a)(4) through (a)(6) and (a)(8) through (a)(9) and (c) of this section shall not apply after Customs commences a formal investigation with respect to the issue involved.

(c) *Petitioning procedures for the failure to conduct closing conference.* Except as provided in paragraph (b) of this section, if the estimated or actual termination date for an audit passes without a Customs auditor providing a closing conference to explain the results of the audit, the person being audited may petition in writing for such a conference to the Director, Regulatory Audit Division, at Customs Headquarters. Upon receipt of such a request, the Director shall provide for such a conference to be held within 15 days after the date of receipt.

§ 163.14 Recordkeeping Compliance Program.

The Recordkeeping Compliance Program is a voluntary program under which certified recordkeepers are eligible for alternatives to penalties and may be entitled to greater mitigation of any recordkeeping penalty that might be assessed should they be unable to produce a requested record.

(a) *Certification Procedures.*—(1) *Who may apply.* Any party described in § 163.2(a) and (c), and any person or organization designated to maintain entry records for those entities previously listed may apply to participate in Customs Recordkeeping Compliance Program. Participation in Customs Recordkeeping Compliance Program is voluntary.

(2) *Where to apply.* Applications shall be submitted to the U.S. Customs Service, Field Director, Regulatory Audit Division, 909 S.E. First Street, Miami, Florida 33131. Applications shall be submitted in accordance with guidelines in the Recordkeeping Compliance Handbook.

(3) *Certification requirements.* A recordkeeper may be certified and enter into a recordkeeping agreement with Customs as a participant in the recordkeeping compliance program after meeting the general recordkeeping requirements established by Customs or after negotiating an alternative program suited to the needs of the recordkeeper and Customs. To be certified, a recordkeeper must be in compliance with Customs laws and regulations. Customs will take into account, the size and nature of the importing business, volume of imports and Customs workload constraints, prior to proceeding with any certification. In order to be certified, a recordkeeper is required to:

(i) Comply with the requirements set forth in the applicable Customs Recordkeeping Compliance Handbook;

(ii) Understand the legal requirements for recordkeeping, including the nature of the records required to be maintained and produced and the required time periods;

(iii) Have in place procedures to explain the recordkeeping requirements to those employees who are involved in the preparation, maintenance and production of required records;

(iv) Have in place procedures regarding the preparation and maintenance of required records, and the production of such records to Customs;

(v) Have designated a dependable individual or individuals to be responsible for recordkeeping compliance under the program whose duties include maintaining familiarity with the recordkeeping requirements of Customs;

(vi) Have a record maintenance procedure approved by Customs for original records, or, if approved by Customs, for alternative records or recordkeeping formats other than original records; and

(vii) Have procedures for notifying Customs of occurrences of variances to, and violations of, the requirements of the recordkeeping compliance program or negotiated alternative program, and for taking corrective action when notified by Customs of violations or problems

regarding such program. The term "variance" means a deviation from the signed recordkeeping agreement that does not involve a failure to maintain or produce records or a failure to maintain the requirements set forth in this paragraph. The term "violation" means a deviation from the signed agreement that involves a failure to maintain or produce records or a failure to maintain the requirements set forth in this paragraph.

(b) *Benefits of participation.*—(1) *Alternatives to penalties.* Participants in the program are eligible for alternatives to the recordkeeping penalties and to greater mitigation of any recordkeeping penalty the party might be assessed should they be unable to produce a requested entry record. If a certified participant does not produce a demanded entry record or information for a specific release or provide information by acceptable alternate means, Customs shall, in the absence of willfulness or repeated violations and in lieu of a monetary penalty, issue a written notice of violation to the party as described in paragraph (b)(2) of this section. Willful failure to produce records or repeated violations of the recordkeeping requirements with no attempt to correct deficiencies and/or a failure to exercise reasonable care in the maintenance of records or compliance with recordkeeping requirements may cause a certified recordkeeper to be removed from the program and may subject the recordkeeper to immediate penalty action for failing to produce records.

(2) *Contents of Notice.* A notice of violation issued for failure to release or provide information to Customs by a participant in the recordkeeping compliance program shall:

(i) State that the recordkeeper has violated the recordkeeping requirements;

(ii) Indicate the record or information which was demanded and not produced;

(iii) Warn the recordkeeper that future failures to produce demanded records or information may result in the imposition of monetary penalties; and

(iv) Warn the recordkeeper that noncompliance could result in the removal of the participant from the recordkeeping compliance program.

(c) *Application, approval and certification process.*—(1) *Application procedures.* Applicants must follow the guidance and requirements contained in Customs Recordkeeping Compliance Handbook. This handbook may be obtained by downloading it from the Customs Electronic Bulletin Board (703–440–6155) or, by mail from the U.S. Customs Service, Office of Strategic Trade, Regulatory Audit Division, Recordkeeping Compliance Program, 909 S.E. First Street, Suite 710, Miami, FL 33131.

(2) *Action on applications.* The regulatory audit field office designee will process the application coordinating with the appropriate Customs headquarters and field officials. The regulatory audit field office will review and verify the information contained within the application and

may perform an on-site verification prior to certification. If an on-site visit is warranted, the regulatory audit field office shall inform the applicant. If additional information is necessary to process the application, the applicant shall be notified. Customs requests for information not submitted with the application or additional explanation of details will cause delays in the certification of applicants. Requests by Customs for information will result in the suspension of the application certification process. Upon receipt of satisfactory information the certification process will recommence.

(3) *Approval and certification.* If, upon review, Customs determines that certification shall be granted, the applicable Regulatory Audit Field Director shall issue a certification with all the conditions stated.

§ 163.15 Denial, suspension, revocation, and appeal procedures.

(a) *General Information.* Applicants and program participants may appeal the following decisions for administrative review:

(1) Denial of program participation application;

(2) Certification suspension; or

(3) Certification revocation.

(b) *Denials of program eligibility or certification.*—(1) Applicants and participants may appeal Field Director application denials by filing an appeal with the Director, Office of Regulatory Audit, U.S. Customs Service, Washington, DC 20229.

(2) Appeals must be received by the Director, Office of Regulatory Audit within 30 days after notice of the denial.

(3) The Director, Office of Regulatory Audit will review the appeal and respond with a decision within 30 days. If a decision cannot be made within 30 days, the Director will advise the appellant of the reasons for the delay and further actions which will be carried out to resolve the matter and the planned completion date.

(c) *Certification suspension.*—(1) A Regulatory Audit Field Director may suspend the program participation for a certified recordkeeper or a certified recordkeeper's agent when Customs discovers that:

(i) The participant refuses or neglects to obey any proper Customs order or request for records;

(ii) The participant is convicted of acts which would constitute a felony or misdemeanor involving tax fraud, theft, smuggling or other crime involving Customs business;

(iii) The participant commits repeated violations of its recordkeeping compliance program agreement and fails to take corrective action;

(iv) The participant repeatedly fails to produce and maintain records;

(v) The participant's continuous bond has been terminated;

(vi) The participant has failed to file the biennial statement;

(vii) The participant fails to exercise reasonable care in the maintenance of records subject to the recordkeeping requirements; or

(viii) The participant fails to comply with Customs requirements generally.

(2) The suspension shall be effective on the date of issuance and shall remain in effect pending any appeal. Suspension may immediately subject parties to penalties pursuant to § 163.6. Suspension of a certified recordkeeper's agent for a single certified recordkeeper shall also cause suspension for that certified recordkeeper. Suspension of a certified recordkeeper's agent who is an agent for multiple certified recordkeepers and has committed violations of the agreements for multiple clients may also cause suspension for all certified recordkeepers for whom the agent is acting or receiving reimbursement for acting as an agent. Customs will review the agent's recordkeeping procedures to determine whether such action is necessary. It shall be the duty of the agent to provide notification of the suspension to all certified recordkeepers and other recordkeepers for whom the agent is acting or receiving reimbursement for acting as an agent. Failure of an agent to provide such notification shall be grounds for revocation of an agent's certification for all certified recordkeepers. Customs shall publish in the Federal Register all agent suspensions.

(d) *Certification Revocation.*

(1) A Regulatory Audit Field Director may revoke the program certification of a certified recordkeeper or a certified recordkeeper's agent after appropriate notice when the following conditions are discovered:

(i) The certification privilege was obtained through fraud or mistake of fact;

(ii) The participant fails to take corrective action after notification of a suspension by Customs;

(iii) The participant fails to provide entry information or documents when requested by Customs on a recurring basis;

(iv) A certified recordkeeper's agent fails to notify all certified recordkeepers for whom it acts as an agent that it has been suspended for actions relating to one of the certified recordkeepers for whom it acts;

(v) The participant is convicted of or has committed acts which would constitute a felony, or a misdemeanor involving theft, smuggling, or a theft-connected crime; or

(vi) The participant fails to exercise reasonable care in the maintenance of records in accordance with the recordkeeping requirements.

(2) The revocation shall be effective on the date of issuance and shall remain in effect pending any appeal. Revocation subjects parties to penalties pursuant to § 163.6. Revocation of a certified recordkeeper's agent for a single certified recordkeeper shall also cause revocation for that certified recordkeeper. Revocation of a certified recordkeeper's agent who is an agent for multiple certified recordkeepers and has committed violations of the agreements for multiple clients shall also cause revocation for all certified recordkeepers for whom the agent is acting or receiving reimbursement for acting as an agent. It shall be the duty of the agent to provide notice of the revocation to all certified recordkeepers and other recordkeepers for whom the agent is acting or receiving

reimbursement for acting as an agent. Customs shall publish in the Federal Register all agent revocations.

(e) *Procedures for revocation or suspension.*

A Regulatory Audit Field Director may for due cause serve notice in writing to a certified recordkeeper suspending or revoking certification. Such notice shall advise the recordkeeper of the grounds for the action and shall inform the recordkeeper of the procedures which should be followed should the recordkeeper wish to appeal the suspension or revocation.

(f) *Appeal of revocation or suspension.*

(1) A recordkeeper who has received a notice of revocation or suspension of certification in the recordkeeping compliance program may appeal the decision of the Field Director to the Director, Regulatory Audit Division at Customs Headquarters.

(2) The Director, Regulatory Audit Division at Customs Headquarters shall consider the allegations and responses made by the recordkeeper and shall render his decision, in writing, within 30 days.

APPENDIX TO PART 163

INTERIM (a)(1)(A) LIST

LIST OF RECORDS REQUIRED FOR THE ENTRY OF MERCHANDISE

GENERAL INFORMATION: Section 508 of the Tariff Act of 1930, as amended (19 U.S.C. 1508), sets forth the general record keeping requirements for Customs-related activities. Section 509 of the Tariff Act of 1930, as amended (19 U.S.C. 1509) sets forth the procedures for the production and examination of those records (which includes, but is not limited to, any statement, declaration, document, or electronically generated or machine readable data).

Section 509(a)(1)(A) of the Tariff Act of 1930, as amended by title VI of Public Law 103–182, commonly referred to as the Customs Modernization Act (19 U.S.C. 1509(a)(1)(A)), requires the production, within a reasonable time after demand by the Customs Service is made (taking into consideration the number, type and age of the item demanded) if "such record is required by law or regulation for the entry of the merchandise (whether or not the Customs Service required its presentation at the time of entry)". Section 509(e) of the Tariff Act of 1930, as amended by Public Law 103–182 (19 U.S.C. 1509(e)) requires the Customs Service to identify and publish a list of the records and entry information that is required to be maintained and produced under subsection (a)(1)(A) of section 509 (19 U.S.C. 1509 (a)(1)(A)). This list is commonly referred to as **"the (a)(1)(A) list."**

The Customs Service has tried to identify all the presently required entry information or records on the following list. However, as automated programs and new procedures are introduced, these may change. In addition, errors and omissions to the list may be discovered upon further review by Customs officials or the trade. Pursuant to section 509(g), the failure to produce listed records or information upon rea-

sonable demand may result in penalty action or liquidation or reliquidation at a higher rate than entered. A record keeping penalty may not be assessed if the listed information or records are transmitted to and retained by Customs.

Other recordkeeping requirements: *The importing community and Customs officials are reminded that the (a)(1)(A) list only pertains to records or information required for the entry of merchandise. An owner, importer, consignee, importer of record, entry filer, or other party who imports merchandise, files a drawback claim or transports or stores bonded merchandise, any agent of the foregoing, or any person whose activities require them to file a declaration or entry, is* ***also*** *required to make, keep and render for examination and inspection records (including, but not limited to, statements, declarations, documents and electronically generated or machine readable data) which pertain to any such activity or the information contained in the records required by the Tariff Act in connection with any such activity; and are normally kept in the ordinary course of business. While these records are not subject to administrative penalties, they are subject to examination and/or summons by Customs officers. Failure to comply could result in the imposition of significant judicially imposed penalties and denial of import privileges.*

The following list does not replace entry requirements, but is merely provided for information and reference. In the case of the list conflicting with regulatory or statutory requirements, the latter will govern.

List of Records and Information Required for the Entry of Merchandise

The following records (which includes, but is not limited to, any statement, declaration, document, or electronically generated or machine readable data) are required by law or regulation for the entry of merchandise and are required to be maintained and produced to Customs upon reasonable demand (whether or not Customs required its presentation at the time of entry). Information may be submitted to Customs at time of entry in a Customs authorized electronic or paper format. Not every entry of merchandise requires all of the following information. Only those records or information applicable to the entry requirements for the merchandise in question will be required/mandatory. The list may be amended as Customs reviews its requirements and continues to implement the Customs Modernization Act. When a record or information is filed with and retained by Customs, the record is not subject to record keeping penalties, although the underlying backup or supporting information from which it is obtained may also be subject to the general record retention regulations and examination or summons pursuant to 19 U.S.C. 1508 and 1509.

(All references, unless otherwise indicated, are to title 19, Code of Federal Regulations, April 1, 1995 Edition, as amended by subsequent Federal Register notices.)

I. General list or records required for most entries. Information shown with an asterisk (*) is usually on the appropriate form and filed with and retained by Customs:

141.11–.15	Evidence of right to make entry (airway bill/bill of lading or *carrier certificate, etc.) when goods are imported on a common carrier.
141.19	*Declaration of entry (usually contained on the entry summary or warehouse entry)
141.32	Power of attorney (when required by regulations)
141.54	Consolidated shipments authority to make entry (if this procedure is utilized)
142.3	Packing list (where appropriate)
142.4	Bond information (except if 10.101 or 142.4(c) applies)

Parts 4,18,122,123 *Vessel, Vehicle or Air Manifest (filed by the carrier)

II. The following records or information are required by 141.61 on Customs Form (CF) 3461 or CF 7533 or the regulations cited. Information shown with an asterisk (*) is contained on the appropriate form and/or otherwise filed with and retained by Customs:

142.3, .3a	*Entry Number
	*Entry Type Code
	*Elected Entry Date
	*Port Code
142.4	*Bond information
141.61,142.3a	*Broker/Importer Filer Number
141.61,142.3	*Ultimate Consignee Name and Number/street address of premises to be delivered
141.61	*Importer of Record Number
	*Country of Origin
141.11	*IT/BL/AWB Number and Code
	*Arrival Date
141.61	*Carrier Code
	*Voyage/Flight/Trip
	*Vessel Code/Name
	*Manufacturer ID Number (for AD/CVD must be actual mfr.)
	*Location of Goods-Code(s)/Name(s)
	*U.S. Port of Unlading
	*General Order Number (only when required by the regulations)
142.6	*Description of Merchandise
142.6	*HTSUSA Number
142.6	*Manifest Quantity
	*Total Value
	*Signature of Applicant

III. In addition to the information listed above, the following records or items of information are required by law and regulation for the entry of merchandise and are presently required to be produced by the importer of record at the time the Customs Form 7501 is filed.

141.61	*Entry Summary Date
141.61	*Entry Date
142.3	*Bond Number, Bond Type Code and Surety code
142.3	*Ultimate Consignee Address
141.61	*Importer of Record Name and Address
141.61	*Exporting Country and Date Exported
	*I.T. (In-bond) Entry Date (for IT Entries only)
	*Mode of Transportation (MOT Code)
141.61	*Importing Carrier Name
141.82	Conveyance Name/Number
	*Foreign Port of Lading
	*Import Date and Line Numbers
	*Reference Number
	*HTSUS Number
141.61	*Identification number for merchandise subject to Anti-dumping or Countervailing duty order (ADA CVD Case Number)
141.61	*Gross Weight
	*Manifest Quantity
141.61	*Net Quantity in HTSUSA Units
141.61	*Entered Value, Charges, and Relationship
141.61	*Applicable HTSUSA Rate, ADA/CVD Rate, I.R.C. Rate, and/or Visa Number, Duty, I.R. Tax, and Fees (e.g. HMF, MPF, Cotton)
141.61	Non-Dutiable Charges
141.61	*Signature of Declarant, Title, and Date
	*Textile Category Number
141.83,.86	Invoice information which includes-e.g., date, number, merchandise (commercial product) description, quantities, values, unit price, trade terms, part, model, style, marks and numbers, name and address of foreign party responsible for invoicing, kind of currency
	Terms of Sale
	Shipping Quantities
	Shipping Units of Measurements
	Manifest Description of Goods
	Foreign Trade Zone Designation and Status Designation (if applicable)
	Indication of Eligibility for Special Access Program (9802/GSP/CBI) 141.89 CF 5523
141.89, et al	Corrected Commercial Invoice

141.86 (e)	Packing List
177.8	*Binding Ruling Identification Number (or a copy of the ruling)
10.102	Duty Free Entry Certificate (9808.00.30009 HTS)
10.108	Lease Statement

IV. Documents/records or information required for entry of special categories of merchandise (The listed documents or information is only required for merchandise entered (or required to be entered) in accordance with the provisions of the sections of 19 CFR (the Customs Regulations) listed). *These are In addition to any documents/records or information required by other agencies in their regulations for the entry of merchandise:*

4.14	CF 226 Information for vessel repairs, parts and equipment
7.8(a)	CF 3229 Origin certificate for insular possessions
7.8(b)	CF 3311 and Shipper's declaration for insular possessions
Part 10	Documents required for entry of articles exported and returned:
10.1–10.6	foreign shipper's declaration or master's certificate, declaration for free entry by owner, importer or consignee
10.7	certificate from foreign shipper for reusable containers
10.8	declaration of person performing alterations or repairs declaration for non-conforming merchandise
10.9	declaration of processing
10.24	declaration by assembler
	endorsement by importer
10.31,.35	Documents required for Temporary Importations Under Bond:
	Information required, Bond or Carnet
10.36	Lists for samples, professional equipment, theatrical effects
	Documents required for Instruments of International Traffic:
10.41	Application, Bond or TIR carnet
	Note: additional 19 U.S.C. 1508 records: see 10.41b(e)
10.43	Documents required for exempt organizations
10.46	Request from head of agency for 9808.00.10 or 9808.00.20 HTSUS treatment
	Documents required for works of art
10.48	declaration of artist, seller or shipper, curator, etc
10.49,.52	declaration by institution

10.53	declaration by importer USFWS Form 3–177, if appropriate
10.59,.63	Documents/ CF 5125/ for withdrawal of ship supplies
10.66,.67	Declarations for articles exported and returned
10.68.,69	Documents for commercial samples, tools, theatrical effects
10.70,.71	Purebred breeding certificate
10.84	Automotive Products certificate
10.90	Master records and metal matrices: detailed statement of cost of production.
10.98	Declarations for copper fluxing material
10.99	Declaration of non-beverage ethyl alcohol, ATF permit
10.101–.102	Stipulation for government shipments and/or certification for government duty-free entries, etc.
10.107	Report for rescue and relief equipment
15 CFR 301	Requirements for entry of scientific and educational apparatus
10.121	Certificate from USIA for visual/auditory materials
10.134	Declaration of actual use (When classification involves actual use)
10.138	End Use Certificate
10.171–	Documents, etc. required for entries of GSP merchandise
10.173,10.175	GSP Declaration (plus supporting documentation)
10.174	Evidence of direct shipment
10.179	Certificate of importer of crude petroleum
10.180	Certificate of fresh, chilled or frozen beef
10.183	Civil aircraft parts/simulator documentation and certifications
10.191–.198	Documents, etc. required for entries of CBI merchandise
	CBI declaration of origin (plus supporting information)
10.194	Evidence of direct shipment
†*[10.306*	*Evidence of direct shipment for CFTA]*
†*[10.307*	*Documents, etc. required for entries under CFTA* *Certificate of origin of CF 353]* *[†CFTA provisions are suspended while NAFTA remains in effect. See part 181]*
12.6	European Community cheese affidavit
12.7	HHS permit for milk or cream importation
12.11	Notice of arrival for plant and plant products
12.17	APHIS Permit animal viruses, serums and toxins
12.21	HHS license for viruses, toxins, antitoxins, etc for treatment of man

12.23	Notice of claimed investigational exemption for a new drug
12.26–.31	Necessary permits from APHIS, FWS & foreign government certificates when required by the applicable regulation
12.33	Chop list, proforma invoice and release permit from HHS
12.34	Certificate of match inspection and importer's declaration
12.43	Certificate of origin/declarations for goods made by forced labor, etc.
12.61	Shipper's declaration, official certificate for seal and otter skins
12.73 12.80	Motor vehicle declarations
12.85	Boat declarations(CG–5096) and USCG exemption
12.91	FDA form 2877 and required declarations for electronics products
12.99	Declarations for switchblade knives
12.104–.104i	Cultural property declarations, statements and certificates of origin
12.105–.109	Pre-Columbian monumental and architectural sculpture and murals certificate of legal exportation evidence of exemption
12.110–	Pesticides, etc. notice of arrival
12.118–.127	Toxic substances: TSCA statements
12.130	Textiles & textile products Single country declaration Multiple country declaration VISA
12.132	NAFTA textile requirements
54.5	Declaration by importer of use of use of certain metal articles
54.6(a)	Re-Melting Certificate
114	Carnets (serves as entry and bond document where applicable)
115	Container certificate of approval
128	Express consignments
128.21	*Manifests with required information (filed by carrier)
132.23	Acknowledgment of delivery for mailed items subject to quota
133.21(b)(6)	Consent from trademark or trade name holder to import otherwise restricted goods
134.25,.36	Certificate of marking; notice to repacker
141.88	Computed value information

141.89	Additional invoice information required for certain classes of merchandise including, but not limited to: *Textile Entries:* Quota charge Statement, if applicable including Style Number, Article Number and Product *Steel Entries* Ordering specifications, including but not limited to, all applicable industry standards and mill certificates, including but not limited to, chemical composition.
143.13	Documents required for appraisement entries bills, statements of costs of production value declaration
143.23	Informal entry: commercial invoice plus declaration
144.12	Warehouse entry information
145.11	Customs Declaration for Mail, Invoice
145.12	Mail entry information (CF 3419 is completed by Customs but formal entry may be required.)
148	Supporting documents for personal importations
151 subpart B	Scale Weight
151 subpart B	Sugar imports sampling/lab information (Chemical Analysis)
151 subpart C	Petroleum imports sampling/lab information
	Out turn Report 24. to 25.–Reserved
151 subpart E	Wool and Hair invoice information, additional documents
151 subpart F	Cotton invoice information, additional documents
181.22	NAFTA Certificate of origin and supporting records
19 USC 1356k	*Coffee Form O (currently suspended)*

Other Federal and State Agency Documents

State and Local Government Records
Other Federal Agency Records (See 19 CFR Part 12, 19 U.S.C. 1484, 1499)
Licenses, Authorizations, Permits

Foreign Trade Zones

146.32	Supporting documents to CF 214

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: December 30, 1996.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, April 23, 1997 (62 FR 19704)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 97–40)

TAIWAN INTERNATIONAL STANDARD ELECTRONICS, LTD. ("TAISEL"), PLAINTIFF *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS

Court No. 92–08–00532

[Plaintiff's motion for judgment on the agency record granted; remanded to the International Trade Administration.]

(Dated April 4, 1997)

Ablondi, Foster & Sobin, P.C. (Italo H. Ablondi, Peter J. Koenig, F. David Foster and *Robert Maguire)* for the plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Cynthia B. Schultz);* and Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce *(Priya Alagiri),* of counsel, for the defendants.

OPINION AND ORDER

AQUILINO, *Judge:* Counsel for the plaintiff have interposed a motion which the court deems made pursuant to CIT Rule 56.2 for judgment upon the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Certain Small Business Telephone Systems and Subassemblies Thereof From Taiwan; Final Results of Antidumping Duty Administrative Review,* 57 Fed.Reg. 29,283 (July 1, 1992). For the reasons discussed hereinafter, the court in accordance with subsections (a)(2) and (b)(1)(B) of 19 U.S.C. §1516a (1992) and with 28 U.S.C. §1581(c) and §2643(c)(1) concludes that this motion must be granted.

I

The motion represents that within a year of its commencement TAISEL's attempt at marketing its merchandise in the United States had become "a disaster, with massive returns of defective product", where-

upon it "exited the SBTS business."[1] Nonetheless, the company (and others) requested that the ITA conduct an administrative review of its outstanding antidumping-duty order[2],

> not to affect the dumping duty deposit rate for future SBTS entries. Rather, Taisel's basic concern was that its now former U.S. SBTS customer, Allied Industrial and Engineering Corporation * * *, the importer of record * * *, not be subject to dumping duties on defective SBTS which Allied received and then shipped back to Taisel in Taiwan. The vast bulk (82%) of SBTS that Taisel shipped * * * was returned to Taiwan since it was defective. More generally, [it] also did not want the importer of record to be excessively penalized as far as dumping duties by Taisel's business misfortune.

Plaintiff's Memorandum, pp. 8–9 (footnotes omitted). The motion further shows that after commencement of the agency review and receipt of a questionnaire in connection therewith, TAISEL contacted the ITA to confirm that its returned goods[3] were entitled to duty drawback and would not be subjected to antidumping duties. Thereafter, the company submitted a lengthy response to the questionnaire in a timely manner. *See* Plaintiff's Appendix, Attachment 1.

Among other things, that response included a statement by TAISEL's export manager, attempting to describe the circumstances of the failed business attempt, which according to him "demonstrated no dumping in the U.S.A. in intent or in fact." *Id.* at 7. Whatever the intent, the statement reported:

> Since our small business * * * never stabilized into a smooth running operation there were no specific and systematic accounting data * * * established before the product line was terminated. That is the data for the subject product [are] mixed together with all other records. To reconstruct the data to answer your questionnare is practically impossible * * *. To try to retrieve and reconstruct the necessary information in accordance with the instructions in your questionnaire would seriously disrupt our on-going operations. We, therefore, will not participate in the review as structured.

Id. at 6–7. See also id. at 5. Whereupon counsel's letter of transmittal made the following points:

> 1. Per discussions with Department officials, Taisel states which * * * SBTS shipments * * * were later shipped out of the United States, and includes supporting documents. Taisel understands that, for this SBTS, Taisel does not have to respond to the Department's questionnaire.
>
> 2. Per *Asociacion Colombiana de Exportadores de Flores v. United States*, Slip Op. 89–92 (CIT June 29, 1989), Taisel states its reasons for not responding to the Department's questionnaire for the few Taisel SBTS units which remain in the United States.

---

[1] Plaintiff's Memorandum, p. 8. SBTS is the record abbreviation for the company's merchandise, namely, small business telephone systems and subassemblies thereof.

[2] *See* 54 Fed.Reg. 50,790 (Dec. 11, 1989).

[3] *See* Record Document 32; Plaintiff's Appendix, Attachment 1, Tab B, pp. 16–19 and Tab C, pp. 57, 61, 64, 67. *Cf.* Plaintiff's Memorandum, Attachment 1.

> There, the court found that this information should be given for best information available ("BIA") decisions.
>
> 3. Finally, per *Rhone Poulenc v. United States*, 899 F.2d 118[5], 1190–91 (Fed.Cir. 1990), Taisel offers the "most probative" evidence of the appropriate BIA dumping margin for Taisel SBTS which remained in the United States.

Id. at 1.

In its *Certain Small Business Telephone Systems and Subassemblies Thereof From Taiwan; Preliminary Results of Antidumping Duty Administrative Review*, 56 Fed.Reg. 57,613 (Nov. 13, 1991), the ITA recognized TAISEL's statement but also responded that it had resorted to best information otherwise available within the meaning of 19 U.S.C. §1677e(c), leading to a margin of 129.73 percent for the company, which was the highest rate found during the agency's investigation of alleged sales at less than fair value. *See* 54 Fed.Reg. at 42,550. When TAISEL reacted that the ITA "should not assign a punitive BIA rate to sales by a cooperating company that is unable to respond for reasons unrelated to the antidumping case"[4] but should assign a rate "that is an intelligent approximation of * * * actual dumping margins"[5], the agency reaffirmed the foregoing margin per the following published rationale:

> * * * [W]henever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, we use BIA. In its response and case brief Taisel explained that it was unable to respoind *[sic]* to the Department's questionnaire since its SBTS business no longer exists. Taisel, however, had sales during the period of review which were subject to the antidumping order. Taisel is not excused from responding to the questionnaire with respect to these sales simply because Taisel no longer produces SBTS. When a respondent fails to respond to the Department's questionnaire, it is the Department's practice to use as BIA the higher of: (1) The highest of the rates found for any firm in the LTFV investigation; or (2) the highest rate found in any administrative review. Accordingly, Taisel's final BIA rate is 129.73 percent, the highest calculated rate from the LTFV investigation.

57 Fed.Reg. at 29,287. When the company also objected that any antidumping rate apply only to its merchandise remaining in this country, the ITA disagreed:

> * * * Due to the inability of Taisel to report its sales in response to the Department's questionnaire, we have not been able to assemble a list on an entry-by-entry basis in order to instruct Customs. We can only instruct Customs based on our analysis in an administrative review. Although it is our practice to exclude verifiable sales that were canceled and re-exported, Taisel has not provided an adequate response for us to make such an exclusion from our finding.

Id.

---

[4] 57 Fed.Reg. at 29,287.

[5] *Id.*

II

Plaintiff's motion at bar takes the position that the foregoing agency reasoning is unsupported by substantial evidence on the record or otherwise not in accordance with law within the meaning of 19 U.S.C. § 1516a(b)(1)(B) (1992).

A

On its face, the response with respect to the returned merchandise admits that ITA practice is to exclude sales that were canceled or re-exported. Hence, the focus of the court is whether there is substantial evidence on the record in support of the agency's determination not to exclude such sales by the plaintiff. On this issue, there can be no quarrel with the long-standing judicial definition of substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). And "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). Nor can there be any dispute with the rule that parties which do not cooperate with the government do so at their own peril. *See, e.g., NTN Bearing Corp. of America v. United States*, 19 CIT ___, ___, 905 F.Supp. 1083, 1088–89 (1995); *Mitsuboshi Belting Limited v. United States*, 21 CIT ___, Slip Op. 97–28 (March 12, 1997).

As this court understands the determination under review, the ITA simply took TAISEL's statement of inability to participate at face value:

> Therefore, Commerce did not conduct an administrative review of Taisel's SBTS entries in the United States and, accordingly, did not reach a conclusion with regard to Taisel's canceled sales. Justifiably, Commerce could not instruct Customs with regard to those entries on an entry-by-entry basis * * *.
>
> Generally, it is Commerce's practice to "*exclude verifiable sales that were canceled and re-exported.*" * * * In this case, however, Taisel refused to respond to the questionnaire in the format required by Commerce * * *. As a consequence, Commerce never analyzed Taisel's sales or verified Taisel's claims that certain sales were canceled. Thus, Commerce was unable to instruct Customs to exclude from antidumping duties certain entries which allegedly covered cancelled sales.

Defendants' Memorandum, p. 18 (citations omitted, emphasis in original). That the agency opted for this approach does not permit the court to do so. That is, it has had to review the entire record developed, which reveals the Antidumping Request for Information, Form ITA346–P, provided to the parties. While more refined than other interrogatories with which the court is familiar, they do not seem as demanding format-wise as are IRS Form 1040 or FTC Form C4, for example. Whatever their exact context, contrary to the impression TAISEL's choice of words of deliverance may have created, the company did indeed produce much

more than a "mere scintilla"[6] of evidence about its returned goods. *See generally* Plaintiff's Appendix, Attachment 1, Tabs B and C. While this evidence is not presented in the format preferred by Section C (Sales to the United States) of the ITA's questionnaire, it also does not favor the agency's determination on the precise issue the plaintiff now appeals. In fact, the record as filed lacks substantial evidence in support of the defendants on that question.

B

As for those goods not returned to Taiwan as defective, the plaintiff has recognized from the beginning, as it must have, the authority of the agency to resort to best information otherwise available in setting an antidumping margin for them. The disagreement at bar is over the selection made. In its preliminary determination, the ITA had stated that, when it applied its so-called two-tier approach to best information otherwise available, it did so for "the same class or kind of merchandise in the same country of origin in accordance with section 776(c) of the Tariff Act." 56 Fed.Reg. at 57,613. Yet, in the end, the agency did not adhere to this representation. That is, the margin at bar was derived from data for Japan, not Taiwan. *Compare Final Determination of Sales at Less Than Fair Value: Certain Small Business Telephone Systems and Subassemblies Thereof From Taiwan*, 54 Fed.Reg. 42,543 (Oct. 17, 1989) *(viz.* Taiwan Nitsuko Co., Ltd.), *with* 57 Fed.Reg. at 29,287, *supra*. Indeed, the ITA had even opined in that determination that that rate was "inappropriate", at least for some Taiwan companies, to wit:

> * * * [T]he "All Others" rate was based solely on Taiwan Nitsuko's BIA rate. For purposes of this final determination, however, the Department has determined that the application of the BIA rate for Taiwan Nitsuko to the "All Others" rate is inappropriate. The Department does not believe that the BIA rate calculated for Taiwan Nitsuko is representative of other unnamed Taiwan manufacturers because, as previously explained, the Department applied section 773(d) of the Act (the MNC provision) to calculate Taiwan Nitsuko's BIA rate. This resulted in comparisons being based only on merchandise produced and sold in Japan to that produced in Japan and sold in the United States.
>
> Instead, the Department has determined that it is more appropriate to apply the margin of SMS, the only responding company from Taiwan, as the "All Other" rate. For SMS, we calculated a dumping margin of 0.00%, which will be applied to the "All Others" rate for cash deposit purposes. We note, however, that the Department has determined that SBTS from Taiwan are being, or are likely to be, sold in the United States at less than fair value. The only company excluded from this determination is SMS. Therefore, all companies subject to the "All Others" rate are covered by the Department's af-

[6] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

> firmative determination, but will be subject to a cash deposit of 0.00%.

54 Fed.Reg. at 42,550.

Counsel are now left to argue that "Commerce determines the applicable BIA rate on a case-by-case basis, rather than by adherence to a particular practice"[7], and that it "never intended its rationale in determining the 'all others' rate should be followed in determining a BIA rate." Defendants' Memorandum, p. 17. But the foregoing determination is part of this case, not undermined by anything of record since its publication of which this court is aware. While the ITA is possessed of broad discretion in carrying out its daunting responsibilities, the exercise thereof is not boundless. For example, courts have held that its resort to best information otherwise available may not be "punitive", which *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed.Cir. 1990), defined as the agency's rejection of low-margin information in favor of high-margin information that is demonstrably less probative of current conditions. To the extent the agency has employed a two-tier approach in this and other proceedings, it has been affirmed by the courts. *See, e.g., Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185 (Fed.Cir. 1993); *Mitsuboshi Belting Limited v. United States*, *supra*. Nonetheless, in *Allied-Signal* the court of appeals concluded that the ITA erred in imposing firsttier information on a party in circumstances not dissimilar to those presented here-in, *e.g.*:

> * * * [T]he record is clear that SNFA did not refuse to cooperate. Prior to the initiation of the administrative review, officials from SNFA and the ITA discussed proposals for a simplified process of review for those companies like SNFA that were in the "all others" category of the LTFV investigation. SNFA concluded that it could not adequately respond to the questionnaire because the particular costing system it had in place and its limited accounting resources made compilation of constructed value data difficult. Additionally, its small-volume production of specialized, custom-made bearings allegedly led to an absence of home market sales data.
>
> SNFA alerted the ITA to its difficulty in responding to the questionnaire and indicated its willingness to participate in a simplified review process. Although the ITA acknowledged as much in its correspondence with SNFA and expressed interest in seeking to accommodate SNFA, it ultimately concluded that SNFA had refused to cooperate * * *. However, in view of the undisputed fact that SNFA supplied as much of the requested information as it could and offered to provide the remaining information in a simplified form, we must conclude that it was unreasonable for the ITA to have characterized SNFA's behavior as a refusal to cooperate.

996 F.2d at 1192. Whereupon that case was remanded to the ITA. *See Allied-Signal Aerospace Co. v. United States*, 17 CIT 754, *aff'd*, 17 CIT 1124, 833 F.Supp. 935 (1993), *aff'd*, 28 F.3d 1188 (Fed.Cir. 1994), *cert. denied*, 115 S.Ct. 722 (1995).

---

[7] Defendants' Memorandum, p. 12.

After careful review of the record at hand and consideration of the arguments of opposing counsel made thereon, the court cannot and therefore does not conclude that relief different from that in *Allied-Signal* is warranted herein.

III

In view of the foregoing, plaintiff's motion for judgment on the ITA record must be granted to the extent of remand to that agency for further proceedings not inconsistent with this opinion. The defendants may have 90 days for such proceedings and to report the results thereof to the court, whereupon the plaintiff may file written comment(s) within 30 days.

(Slip Op. 97–41)

CINSA, S.A. DE C.V., PLAINTIFF *v.* UNITED STATES, DEFENDANT AND GENERAL HOUSEWARES CORP., DEFENDANT-INTERVENOR

Court No. 93–09–00538

[Plaintiff Cinsa, S.A. de C.V. ("Cinsa") moved for judgment on the agency record challenging four findings underlying the final results of the fourth administrative review of the antidumping order *Porcelain-on-Steel Cooking Ware from Mexico*, 58 Fed. Reg. 43,327 (1993). Defendant U.S. Department of Commerce ("Commerce") and defendant-intervenor General Housewares Corp. ("GHC") opposed the motion for judgment on the agency record and requested the Court to sustain the final results in all respects. *Held:* Plaintiff has overcome the burden of proof on the finding of related party transfer price in the final results and that issue is remanded. All other aspects of the final results are affirmed.]

(Dated April 4, 1997)

Manatt, Phelps & Phillips (Irwin P. Altschuler, David R. Amerine and Ronald M. Wisla) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Velta Melnbrencis)* for defendant.

King & Spalding (Joseph W. Dorn and Gregory C. Dorris) for defendant-intervenor.

OPINION

MUSGRAVE, *Judge:* Plaintiff Cinsa, S.A. de C.V. ("Cinsa") brings this action to contest the final results of the fourth administrative review of the antidumping duty order *Porcelain-on-Steel Cooking Ware from Mexico*; *Final Results of Antidumping Duty Administrative Review,* 58 Fed. Reg. 43,327 (1993). In the final results, the U.S. Department of Commerce ("Commerce") determined that Cinsa would be assessed a 8.18% dumping margin. Pursuant to 19 U.S.C. § 1516a(a)(2)(A)(ii) (1994) Cinsa appealed the final results and requested that this Court reverse the final results and remand the action with respect to: (1) calculation of the cost of production ("COP") and constructed value ("CV") using historical rather than revalued depreciation; (2) calculation of COP and CV ex-

cluding employee profit sharing expense; (3) calculation of CV using Cinsa's arm's length purchase prices to value enamel frit raw material costs; and (4) calculation of COP and CV using all verified interest income. The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2)(A) (1994) and remands Commerce's finding of calculation of CV to determine whether the transfer price of enamel frit constituted an arm's length transaction as prescribed by the statute and previous practice. The Court affirms the final results with respect to the calculation of COP and CV using historical rather than revalued depreciation, calculation of COP and CV excluding employee profit sharing expense and calculation of COP and CV using all verified interest income.

BACKGROUND

On December 2, 1986, Commerce issued an antidumping duty order on *Porcelain-on-Steel Cooking Ware from Mexico*, 51 Fed. Reg. 43,415 (1986). On January 30, 1991, Commerce initiated its fourth administrative review of the order as to Cinsa and another Mexican manufacturer covering the period from December 1, 1989 to November 30, 1990. *Porcelain-on-Steel Cooking Ware from Mexico; Notice of Initiation*, 56 Fed. Reg. 3,445 (1991). On February 13, 1991 Commerce issued an antidumping questionnaire to Cinsa and Cinsa filed a timely response on April 26, 1991. Commerce issued a supplemental questionnaire to Cinsa on June 5, 1991 and Cinsa made timely supplemental response on June 21, 1991. Commerce conducted an on-site verification of Cinsa's questionnaire responses between July 8 and July 12, 1991. Separate sales and cost verification reports were issued on December 17, 1991.

On December 27, 1991, Commerce issued its preliminary determination establishing a 6.27% dumping margin for Cinsa. *Porcelain-on-Steel Cooking Ware from Mexico*; *Preliminary Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 67,062 (1991). For the preliminary determination Commerce revised Cinsa's reported COP and/or CV calculations to: (1) increase COP and CV to take into account revalued depreciation; (2) increase COP and CV to take into account employee profit sharing expenses; (3) use best information available ("BIA") to increase the reported raw material costs for enamel frit; and (4) increase COP and CV by offsetting total interest expense with short-term interest expense to zero. Cinsa and defendant-intervenor General Housewares Corp. ("GHC") submitted their comments on January 27, 1992. On February 3, 1992, Cinsa and GHC filed comments in rebuttal. On August 16, 1993, Commerce published the final results of the antidumping administrative review establishing an 8.18% antidumping duty assessment rate and future duty deposit rate for Cinsa. *Porcelain-on-Steel Cooking Ware from Mexico; Final Results of Antidumping Duty Administrative Review*, 58 Fed. Reg. 43,327 (1993) ("final results").

On August 24, 1993, Cinsa timely filed comments alleging ministerial and clerical errors in Commerce's final results. On September 1, 1993, GHC filed a response to Cinsa's claims of clerical errors. Cinsa timely filed this action to contest the alleged errors on September 15, 1993. On

December 23, 1993, Commerce determined that certain errors were, indeed, made in the final results and revised Cinsa's antidumping duty assessment rate and future duty deposit rate to 6.71%. On March 31, 1994, this Court granted leave for Commerce to publish the corrected final results of its fourth administrative review, which was published on May 6, 1994. *Porcelain-on-Steel Cooking Ware from Mexico; Amendment to Final Results of Antidumping Duty Administrative Review*, 59 Fed. Reg. 23,694 (1994). Cinsa nevertheless appeals the findings made in the amended final results with respect to Commerce's: (1) calculation of COP and CV using historical rather than revalued depreciation; (2) calculation of COP and CV excluding employee profit sharing expense; (3) calculation of CV using Cinsa's arm's length purchase prices to value enamel frit raw material costs; and (4) calculation of COP and CV using all verified interest income.

Standard of Review

The Court "shall hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law, * * *" 19 U.S.C. § 1516a(b)(1)(B) (1994). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citation omitted). "[Substantial evidence] is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomantana, S.A. v. United States*, 10 CIT 399, 404–5, 636 F. Supp. 961, 966 (1986), *aff'd* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted).

Discussion

I. *Revalued Depreciation Costs vs. Historical Depreciation Costs:*

In a preliminary matter, Commerce asserts that Cinsa is barred from bringing the issue of distortion of depreciation cost methods because Cinsa failed to raise the issue during the administrative proceeding. The Court finds that Cinsa's well documented disagreement with the use of revalued depreciation costs in determining COP/CV in the administrative record necessarily involves the issue of distortion. As Commerce states, "[t]his Court has accepted Commerce's practice of using a 'firm's expenses as recorded in its financial statements as long as those statements are prepared in accordance with the home country's GAAP and do not significantly *distort* the firm's financial position or actual costs.'" Def.'s Mem. Opp'n Pl.'s Mot. Summ. J. at 11. (emphasis added) (cita-

tions omitted). Commerce cannot utilize the language of the Court in one instance and disregard that same language in another. The Court finds that distortion of costs is a necessary component in the review of depreciation cost methodology as the quote above clearly points out.

Cinsa submitted depreciation costs based on the historical method in its questionnaire response but submitted financial statements that utilized revalued depreciation costs. Cinsa argues that historical depreciation values best reflects the actual costs during the period of review ("POR"). Commerce relied on depreciation costs based on the revalued method that Cinsa had used to calculate its own financial records. The issue turns on where the burden of persuasion lies: is Commerce required to make a finding that the home market GAAP does not distort COP or is the burden on Cinsa to make a showing that the home market GAAP distorts COP? It is the view of Commerce that the revalued numbers reflect the method accepted by Mexican GAAP, ending their inquiry. Cinsa argued that revalued figures distort the actual costs of the merchandise and should not be used in calculating COP.

Pursuant to an affirmative finding of sales at less than fair value ("LTFV") Commerce is directed to impose an antidumping duty "in an amount equal to the amount by which the foreign market value exceeds the United States Price for the merchandise." 19 U.S.C. § 1673(2)(B) (1994). When Commerce makes a determination that foreign market value ("FMV") cannot be based on home market pricing due to inadequate sales at prices not below the COP in that home market, as is the case here, Commerce may use constructed value ("CV") as a basis for FMV. 19 U.S.C. § 1677b(a)(4) (1994). CV is determined by calculating the sum of the cost of materials and the "fabrication or processing of any kind employed in producing such or similar merchandise * * * which would ordinarily permit the production of that particular merchandise in the ordinary course of business." 19 U.S.C. § 1677b(e) (1994).

In determining CV under these circumstances, Commerce has utilized the cost values from Cinsa's questionnaire responses and from Cinsa's submitted financial statements. Both revalued and historical cost methods are recognized under Mexican generally accepted accounting principles ("GAAP"). Commerce has employed both historical and revalued depreciation methods in determining CV in previous cases.[1] The relevant legislative history provides that Commerce "will employ accounting principles generally accepted in the home market of the country of exportation if [Commerce] is satisfied that such principles reasonably reflect the variable and fixed costs of production the merchandise." H. R. Rep. No. 93–571, at 71 (1973).

---

[1] See *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea*, 57 Fed. Reg. 42,942 (1992) where Commerce used revalued depreciation costs, contrasted with *Stainless Steel Hollow Products from Sweden*, 58 Fed. Reg. 69,332 (1993) where Commerce used historical depreciation costs.

In determining the proper methodology in determining CV, the Court has previously found that

> this Court has consistently upheld Commerce's reliance on a firm's expenses as recorded in the firm's financial statements, as long as those statements were prepared in accordance with the home country's GAAP and does not significantly distort the firm's actual costs.

FAG U.K. Ltd. v. United States, 20 CIT ___, ___, 945 F. Supp. 260, 271 (1996) (citations omitted). The same situation exists in the instant case. Cinsa submitted its financial statements that reflected revalued depreciation costs which were consistent with Mexican GAAP. The Court finds that the burden rests on Cinsa to prove that the use of revalued depreciation in calculating CV and COP distorted costs.

> The court finds that respondents have failed to demonstrate that the ITA's decision to use Hyundai's revalued depreciation expenses is distortive. The verified revalued depreciation expenses were consistent with Korean GAAP and were based on information obtained directly from Hyundai's financial statements.

Laclede Steel Co. v. United States, 18 CIT 965, 975, (1994). Commerce is directed to make a finding that cost values reflect the home country GAAP and were based on that firm's financial statements, which is what occurred in the instant case.[2]

Cinsa failed to satisfy the burden in proving that the use of revalued depreciation costs distorted the actual cost of the subject merchandise. Cinsa argued that use of revalued depreciation costs distorted actual costs of production. Cinsa stated that

> in calculating COP/CV for a specific period of time, the revaluation of assets has a distortive effect on depreciation expenses. Due to constant revaluation, over time the restatement of depreciation of assets results in charges that *can* be greater than the acquisition cost of the asset, and *can* continue past the end of the asset's useful life. Thus, while the restatement of depreciation *may* be appropriate for financial statement purposes, the restatement of depreciation expenses is not appropriate for all purposes.

Pl.'s Mem Supp Summ. J. at 14 (emphasis added). Although Cinsa's argument is objectively correct in that any accounting method *can* or *may* be distortive, Cinsa fails to demonstrate that the revalued method is distortive in the instant case. Cinsa makes no showing that during the POR use of revalued depreciation distorted costs. For example, Cinsa never posits, much less proves, that using the revalued cost method actually resulted in charges that are greater than the acquisition costs of its assets in this case. Cinsa, therefore, has failed to satisfy its burden and the

---

[2] The final results state:

> The Department followed Mexican GAAP and adjusted CINSA's COP data to reflect the revalued depreciation. This approach coincided with CINSA's financial statements, which actually showed historical depreciation adjustments for inflation, and which were prepared in accordance with Mexican GAAP. We did, however, recalculate the amount of the adjustment to the COP to correct a clerical error in the calculation. 58 Fed. Reg. 43,327 at 43,331 (1993).

Court holds that Commerce's use of revalued depreciation costs in determining COP/CV is supported by substantial evidence on the record and otherwise in accordance with law.

II. *Inclusion of Profit Sharing Expense in COP Calculation:*

Cinsa is required to share earned profits with its employees pursuant to Mexican law. Cinsa shares earned profit only if the company actually earns a profit on its operations. Cinsa did not include profit sharing expense paid during the POR in its calculation of COP/CV claiming that profit sharing is contingent on profitability and is not attributable to the cost of production of the subject merchandise and therefore is properly treated as an income tax, which is not included in COP/CV calculations. Commerce, however, included Cinsa's profit sharing expense in its calculation of COP/CV arguing that profit sharing expenses are a part of the production process and therefore a component of labor wages. Relying on its own administrative precedent, Commerce characterized profit sharing expenses as mandatory payments representing "compensations to the employees involved in the production of the merchandise and administration of the company." *Porcelain-on-Steel Cooking Ware from Mexico; Final Results of Antidumping Duty Administrative Review*, 58 Fed. Reg. 43,327 at 43,332 (1993). Commerce has found that all "costs related to labor, bonuses and fringe benefits are considered to be part of the labor expense and, thus, a cost of production." *Porcelain-on-Steel-Cooking Ware From Taiwan*, 51 Fed. Reg. 36,425 at 36,428 (1986).

Including profit sharing expense in the calculation of the COP is an issue of first impression for the Court. Constructed value is ascertained by calculating the sum of the

> the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of business; * * *

19 U.S.C. § 1677b(e)(1) (1994). Whether employee profit sharing expenses should be included in CV and COP calculations turns on how profit sharing expenses are classified. If profit sharing expenses are classified as a necessary component of production, as Commerce argues, they are properly includable in COP/CV calculations. If profit sharing expenses are classified as a type of income tax, profit sharing expenses would not be includable in the cost of production. Mexican law requires firms to pay employees a certain percentage of the profits earned, therefore, profit sharing is properly characterized as a cost of doing business in Mexico and the expense is properly classified as a cost of production as required by the statute. The Court finds that Commerce's inclusion of profit sharing expenses in calculation COP/CP is not inconsistent with 19 U.S.C. § 1677b(e)(1), is supported by substantial evidence and is otherwise in accordance with law.

III. *Related Party Pricing:*

Pursuant to the antidumping statute, Commerce may utilize best information available ("BIA") if pricing between related parties does not "fairly reflect the amount usually reflected in sales in the market under consideration."[3] Commerce determined that Cinsa purchased enamel frit, an ingredient used in production of the subject merchandise, from a related supplier at prices that were not at arm's length and consequently used BIA to calculate the price in determining the CV of the subject merchandise. In the first three administrative reviews, Commerce accepted the pricing from the related supplier in its calculation of constructed value of the subject merchandise. In the fourth administrative review now before the Court, Commerce departed from this methodology and used BIA in its CV calculation. Cinsa objects to this departure from Commerce's methodology used in the three previous reviews.

In its questionnaire response, Cinsa stated that it obtained enamel frit from a related supplier at a cost substantially lower than sales to unrelated parties. Cinsa explained that this discount was due to factors not associated with the relationship with the supplier. Specifically, Cinsa described in its questionnaire response that the discount was due to the savings of transportation costs and volume discounts. Cinsa argues its questionnaire response provided Commerce with adequate information substantiating its claim that the prices of enamel frit were above the cost of production. Cinsa claims that proof of prices above the cost of production is all that Commerce required Cinsa in certifying that the transfer prices were at arm's length.[4] Further, Cinsa also asserts that the information that it had provided in its questionnaire response was exactly the same for the previous three administrative reviews where Commerce posed the identical question yet reached a different conclusion.

Commerce defended its use of BIA by stating that the burden of proof to demonstrate arm's length transactions, the test for related parties, rests squarely on the respondent of the questionnaire. Commerce concluded that Cinsa did not meet this burden in the fourth review because Cinsa failed to provide pricing information on sales of enamel frit to unrelated third parties. In the final results, Commerce found that

> CINSA's submission indicated that the transfer prices from its related supplier were less than the prices paid by an unrelated purchaser of the same material, we determined that the transfer prices

---

[3] 19 U.S.C. § 1677b(f)(2) (1994):

"a transaction directly or indirectly between [related parties] may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration."

[4] Commerce requested the following information from Cinsa in the questionnaire:

For Constructed Value, the transfer price for transactions between the related companies may be used to value materials inputs if the transfer prices are above the cost of production. However, the transfer price must "fairly reflect the amount usually reflected in sales in the market under consideration." For example, if a market exists for the identical or similar input obtained from your related supplier, the price could be compared to purchases from unrelated suppliers. Please explain how you determined that the transfer price was representative of a fair market price. Include an explanation as to how you determined that transfer prices were above the cost of production.

> were not made at arm's length. Therefore, in accordance with 773(e)(2) of the Act [19 U.S.C. § 1677b(f)(2)], we used BIA for constructed value to calculate the cost of the enamel frit used by CINSA.

58 Fed. Reg. 43,327 at 43,332 (1993). Commerce may disregard transactions between related parties if one of the elements of value does not reflect the amount usually reflected in sales in the market for the subject merchandise. 19 U.S.C. § 1677b(f)(2) (1994). The Court agrees with Commerce that the burden is on the respondent to "establish that the transfer price for the purchase of raw material from the related party reflects an arms-length price." Def.'s Mem. Opp'n Pl.'s Mot. Summ. J. at 26 citing *NEC Home Electronics, Ltd. v. United States*, 18 CIT 336 (1994). However, the Court finds that Cinsa has fulfilled its burden by supplying Commerce with an explanation of how Cinsa determined that the transfer price was representative of a fair market price and an explanation of how Cinsa determined that transfer prices were above the cost of production.[5] Cinsa provided the information that Commerce directly requested in the questionnaire. The Court agrees with Cinsa that Commerce cannot disregard the transfer prices based on the fact that Cinsa did not furnish third party sales information. Providing Commerce with third party sales information is not the only means by which to prove arm's length transfer prices.

Cinsa effectively shifted the burden to Commerce by providing a host of information explaining the reasons for the discount in transfer price. The Court finds that Commerce did not subsequently meet its burden in determining that the transfer price was not negotiated at arm's length. Commerce's determination in the final results is merely a conclusory statement that affords the Court no basis for ascertaining whether Commerce took into consideration Cinsa's information that provided reasons for the discount in transfer prices between the related parties.

In the three previous administrative reviews, Commerce accepted Cinsa's submitted transfer prices of enamel frit based on the acceptance that the transfer price was at arm's length. In the fourth administrative review, Commerce rejected Cinsa's submitted transfer prices determining that the transfer prices were not made at arm's length. Cinsa claims that Commerce was obligated to follow the methodology it had adopted in each previous review and Cinsa claims that it provided Commerce with the same information in each of the reviews. Commerce argues that it is not bound by previous determinations and that each "administrative review is a separate administrative procedure, with a separate administrative record, and a separate administrative determination which is reviewable separately by suit in this Court." Def.'s Mem. Opp'n Pl.'s Mot. Summ. J. at 31. Ironically, Commerce quickly makes the com-

---

[5] In its questionnaire response, Cinsa stated

> The discount from the list price is based upon the fact that Cinsa purchases almost [ ] times as much enamel as [the related supplier] sells to all unrelated purchasers combined * * *, there is little or no transportation or packaging expense incurred in the sale of the enamel products to Cinsa * * *. The data contained in Exhibit 30 confirms that the transfer prices paid by Cinsa exceed [the related supplier's] cost of production.

Pl.'s Questionnaire Resp. at 60.

parison that in the first administrative review Commerce "verified that the frit seller charged an arm's length price." *Id.* citing *Porcelain-on-Steel Cooking Ware from Mexico*, 55 Fed. Reg. 21, 061 at 21,064 (1990). It is clear that Commerce did not verify or attempt to verify the information provided by Cinsa in the fourth administrative review as Commerce had done in the first administrative review. The Court is satisfied that Cinsa provided Commerce with the same information on related party transfer prices and Commerce failed to employ the same methodology in the fourth administrative review.

The Court agrees with Commerce that each administrative review is a separate exercise of administrative procedure opening the possibility of different conclusions based on different facts accumulated. Commerce, however, cannot arbitrarily abandon a relied upon methodology. In other words, Commerce can reach different determinations in separate administrative reviews but it must employ the same methodology or give reasons for changing its practice. It is a well settled rule that an agency cannot arbitrarily change its methodology without explanation. As this Court has found:

> While the Commission is not obligated to follow prior decisions if new arguments or facts are presented that support a different conclusion, * * * this does not permit the Commission to act arbitrarily. This is because it is also a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure. This rule is not designed to restrict an agency's consideration of the facts from one case to the next, but rather it is to insure consistency in an agency's administration of a statute.

Citrosuco Paulista, S.A. v. United States, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988) (citations omitted). It is apparent that Commerce applied a different methodology in the fourth administrative review without providing reasons for its departure. The Court finds that Commerce did not satisfy its burden of verifying that the transfer prices were not at arm's length and that Commerce did not provide adequate reasons for departing from its prior methodology. Therefore the finding is contrary to law and not supported by substantial evidence in the record.

IV. *Calculation of Financial Expense:*

Commerce included both short and long-term interest expenses in its calculation of COP and used short-term interest income to offset the interest expenses. The threshold question is whether Cinsa properly presented this issue at the administrative level. Both Commerce and GHC assert that Cinsa failed to raise this issue at the administrative review and should be precluded from arguing the issue before the Court. Cinsa states that there is ample evidence on the record to support its claim that this issue was timely raised. In Cinsa's Supplemental Questionnaire Response, Cinsa stated that

> the ITA has requested that Cinsa report financial expenses based on the total financial expenses, including short-term and long-term

> expenses, whether related to the production of the merchandise under investigation or other corporate activities. *The last sentence of this question requests Cinsa to exclude long-term income, which suggests that the ITA intends to treat interest income different [sic] from interest expense.* Clearly, such different treatment for interest income and expense violates the fundamental precept of antidumping comparisons as announced by the Court of Appeals for the Federal Circuit in *Smith Corona v. United States*, 713 F.2d 1569, 1578 (1982) dumping calculations must be based on an "apples to apples" comparison.

Pl.'s Supplemental Questionnaire Resp. at 3 (emphasis added). From this language it appears that Cinsa properly raised the issue at the administrative level. Commerce and GHC further argue that Cinsa only objected to Commerce's inclusion of long and short-term interest expenses and Cinsa did not raise the issue of offset income accounts. The response underlined above indicates that Cinsa made an issue of the different treatment by Commerce of expenses and incomes on the record and prior to Commerce's final determination. The Court finds that Cinsa properly raised this issue at the administrative level and the issue is properly before the Court.

Commerce included both short and long-term interest expenses in its calculation of COP and used short-term interest income to offset the interest expenses. Cinsa earned substantially more short and long-term interest income than interest expenses it incurred during the POR, therefore, Cinsa desired to have COP calculated with both short and long-term interest income included. Cinsa claims that Commerce erred when it did not include long-term interest income in COP. Cinsa asserts that Commerce should not include either long-term interest expenses or long-term interest income in an effort to make the correct and fair comparison or, in the alternative, if Commerce includes long-term interest expenses, it should also include long-term interest income as an offset, thereby making a fair comparison.

Commerce and GHC contest Cinsa's argument on the basis that exclusion of long-term interest income is a "longstanding methodology" and is a "reasonable exercise of its administrative discretion." Def.'s Mem. Opp'n Pl.'s Mot. Summ. J. at 38. Further, Commerce and GHC contend that long-term interest income does not directly relate to current production cost, while payments of long and short-term interest expense are current costs that must be included in COP. Cinsa claims that Commerce erred when it allowed offset of interest income only to the extent of interest expense. Cinsa bases this argument on the point that this policy ignores "any financial income that exceeds the amount of the company's financial expenses, although there is no difference in the nature of the income taken into account and that ignored." Pl.'s Reply Br. at 38.

Commerce argues that interest income is properly viewed as an offset to interest expense, not to COP, and can only be used to reduce total interest expense to not less than zero. The Court agrees with Commerce.

Under the statute, Commerce is directed to determine COP as "accurately as possible the true cost to the respondent of manufacturing the subject merchandise." *Timken Co. v. United States*, 18 CIT 1, 10, 852 F. Supp. 1040, 1049 (1994). Commerce is further directed to calculate the COP by including all costs of producing the subject merchandise excluding profit under 19 U.S.C. § 1677b and 19 C.F.R. § 353.51(c). The cost of producing the subject merchandise necessarily involves the cost of borrowed capital used in its manufacture in the form of interest expense. Without the borrowed capital, Cinsa would not be able to produce the subject merchandise. Income expense attributable to the production of the subject merchandise is properly identified as an expense and, therefore, includable in calculating COP. Commerce has made it a practice to offset interest expense with interest income that was generated and attributable to the production of the subject merchandise. This is a practice that benefits the respondent by lowering the COP value, which in turn lowers the dumping margin. In the instant case, the offset effectively reduced the interest expense to zero in the calculation of COP. Cinsa claims that Commerce excluded long term interest income offsets that exceeded interest expenses that would have further lowered the COP.

The Court finds that expenses by their nature cannot produce a negative effect on the COP. Expenses, as a component of costs, cannot become a profit by the nature of their designation. Cinsa is effectively requesting that Commerce and the Court recognize a negative cost. Based on sound accounting and economic principles, the Court declines to accept a finding of negative costs when calculating COP. Interest expense, as a component of COP, is a discrete expense account and as such, cannot provide an offset to any other expense accounts. Once the interest expense account is reduced to zero through the offset of interest income, interest expense and interest income has no further effect on the calculation of COP. The Court finds that once interest expense is reduced to zero, no further inquiry is necessary as Commerce cannot enter a profit into the calculation of COP. The Court finds that Commerce's calculation of Cinsa's interest expense for COP is supported by substantial evidence and is otherwise in accordance with law.

The Court recognizes the final decision of the binational panel concerning the fifth administrative review of *Porcelain-on-Steel Cooking Ware from Mexico*. The Court by statute is not bound by the final decision and is not required to consider the final decision.[6]

CONCLUSION

The Court remands Commerce's finding of calculation of CV to determine whether the transfer price of enamel frit constituted an arm's length transaction as prescribed by the statute and previous practice.

---

[6] 19 U.S.C. § 1516a(b)(3) (1194) Effect of decisions by NAFTA or United States Canada binational panels:

In making a decision in any action brought under subsection (a) of this section, a court of the United States is not bound by, but may take into consideration, a final decision of a binational panel or extraordinary challenge committee convened pursuant to article 1904 of the NAFTA or of the Agreement.

The Court affirms all of Commerce's other findings in the amended final results of the fourth administrative review.

(Slip Op. 97–42)

TECOM CO., LTD., PLAINTIFF *v.* UNITED STATES AND THE U.S. DEPARTMENT OF COMMERCE, DEFENDANTS

Court No. 92–08–00538

[Plaintiff's motion for judgment on the agency record granted in part; remanded to the International Trade Administration.]

(Dated April 4, 1997)

Ablondi, Foster & Sobin, P.C. (Italo H. Ablondi, Peter J. Koenig, F. David Foster and *Robert Maguire)* for the plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Cynthia B. Schultz);* and Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce (*Priya Alagiri*), of counsel, for the defendants.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* Counsel for the plaintiff have interposed a motion which the court deems made pursuant to CIT Rule 56.2 for judgment upon the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Certain Small Business Telephone Systems and Subassemblies Thereof From Taiwan; Final Results of Antidumping Duty Administrative Review*, 57 Fed.Reg. 29,283 (July 1, 1992).

I

The order accompanying the motion proposes five specific forms of relief, to wit, instructing the ITA to (a) consider data on a computer tape provided by the plaintiff, (b) make a level-of-trade adjustment for Tecom sales to original equipment manufacturers ("OEMs") in the United States as opposed to dealers or distributors in its home market Taiwan, (c) insure that such adjustment not reflect certain expenses for any home-market sales to OEMs, (d) make circumstances-of-sale adjustments for specified expenses and (e) base any dumping calculation on home-market sales of merchandise to dealers or distributors, not end-users. The plaintiff claims error by the agency with respect to these matters which makes the aforesaid determination unsupported by substantial evidence on the record or otherwise not in accordance with law within the meaning of 19 U.S.C. §1516a(b)–(1)(B) (1992).

The court's jurisdiction to grant such relief emanates from the Trade Agreements Act of 1979, as amended, and the Customs Courts Act of 1980, 28 U.S.C. §1581(c) and §2643(c)(1). The first statute also enabled the ITA to make adjustments in determining foreign-market value whenever it was established that the amount of any difference between the United States price and the foreign-market value was wholly or

partly due to differences in circumstances of sale. 19 U.S.C. §1677b(a)(4)(B) (1992). Regulations promulgated in conjunction with this authority required that claims for adjustment to foreign-market value be established to the satisfaction of the agency[1] and also that the ITA normally would calculate that value and United States price based on sales at the same level of trade. 19 C.F.R. §353.58 (1992). With regard to differences in circumstances of sale, the governing regulation provided:

> (a) *In general*. (1) In calculating foreign market value, the Secretary will make a reasonable allowance for a *bona fide* difference in the circumstances of the sales compared if the Secretary is satisfied that the amount of any price differential is wholly or partly due to such difference. In general, the Secretary will limit allowances to those circumstances which bear a direct relationship to the sales compared.
>
> (2) Differences in circumstances of sale for which the Secretary will make reasonable allowances normally are those involving differences in commissions, credit terms, guarantees, warranties, technical assistance, and servicing. The Secretary also will make reasonable allowances for differences in selling costs (such as advertising) incurred by the producer or reseller but normally only to the extent that such costs are assumed by the producer or reseller on behalf of the purchaser from that producer or reseller.
>
> (b) *Special rule*. (1) Notwithstanding paragraph (a), the Secretary normally will make a reasonable allowance for other selling expenses if the Secretary makes a reasonable allowance for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, but the Secretary will limit the amount of such allowance to the amount of the other selling expenses incurred in the one market or the commissions allowed in the other market, whichever is less.
>
> (2) In comparisons with exporter's sales price, the Secretary will make a reasonable deduction from foreign market value for all expenses, other than those described in paragraph (a)(1) or (a)(2), incurred in selling such or similar merchandise up to the amount of the expenses, other tha[n] those described in paragraph (a)(1) or (a)(2), incurred in selling the merchandise.
>
> (c) *Reasonable allowance*. In deciding what is a reasonable allowance for any difference in circumstances of sale, the Secretary normally will consider the cost of such difference to the producer or reseller but, if appropriate, may also consider the effect of such difference on the market value of the merchandise.

19 C.F.R. §353.56 (1992).

A

According to the record presented herein, upon commencement by the agency of an administrative review of its anti-dumping-duty order[2], questionnaires issued to the plaintiff and other parties. As part of its re-

---

[1] *See* 19 C.F.R. §353.54 (1992).

[2] *See* 54 Fed.Reg. 50,790 (Dec. 11, 1989).

sponse thereto, Tecom submitted a computer tape of apposite data. More than a year thereafter, the ITA reported in the final determination now contested that that tape was "unsolicited" and also "unreadable" and therefore not considered. *See* 57 Fed.Reg. at 29,286 *(Comment 9)*. The plaintiff states that this was the first official report of difficulty deciphering its data, albeit too late for it to attempt to make them all discernible to the agency:

> * * * That delay * * * precluded Tecom from addressing with Commerce * * * the cause of any alleged difficulties with the * * * computer tape. For instance, Tecom's independent computer consulting firm, long-experienced in preparing computer tapes for Commerce dumping investigations, and which prepared the * * * tape * * *, could have consulted with the Commerce's computer staff on this matter in the proceedings below, the typical approach when Commerce believes it has a problem with a computer tape.

Plaintiff's Reply Memorandum, pp. 33–34.

The defendants concede "Commerce's long-standing practice is to notify respondents of deficiencies with regard to information * * * submitted", citing a string of its precedents[3], but reassert the agency's claim that Tecom's tape was unsolicited and aver that ITA "practice is not to even attempt to analyze unsolicited data, let alone notify respondents of deficiencies in [it]". Defendants' Memorandum, p. 39. They cite precedent to this effect[4] and also the rule that parties like Tecom, not the agency, have the obligation of providing intelligible, useful information[5]:

> * * * [I]f the burden of compiling, checking, rechecking, and finding mistakes in [a] submission * * * were placed upon Commerce, it would transform the administrative process into a futility.

Sugiyama Chain Co. v. United States, 16 CIT 526, 531, 797 F.Supp. 989, 994 (1992).

The plaintiff cannot and does not deny its responsibilities, or claim that the printout of its computer data, as originally submitted, was entirely free of errors. But the record also reflects that Tecom stood ready to correct them in a timely manner and that most, if not all, could have and would have been rectified. Moreover, substantial evidence might have been discovered from the tape even as first filed.

Given the record herein, the court also concludes that the belated defense of lack of solicitation[6] is untenable. To begin with, the agency's general instructions for responding to its Antidumping Request for Information advised:

---

[3] Defendants' Memorandum, p. 38.

[4] *See id.* at 39, n. 17.

[5] *See, e.g., NSK Ltd. v. United States*, 17 CIT 590, 593, 825 F.Supp. 315, 319 (1993).

[6] *Certain Small Business Telephone Systems and Subassemblies Thereof From Taiwan; Preliminary Results of Antidumping Duty Administrative Review,* 56 Fed.Reg. 57,613 (Nov. 13, 1991), obviously published at an earlier moment, makes no mention of this attitude.

> Be as detailed as possible in your response * * *. * * * [Y]ou may supplement your replies with whatever additional data you believe will clarify your situation * * *.

Apparently, parties in addition to Tecom availed themselves of this invitation. And the ITA did not reject such submissions as unsolicited. *See, e.g.*, 57 Fed.Reg. at 29,287 (Sinoca *Comment 4*). Indeed, whether or not specifically solicited, to this court's understanding, the agency in a case like this prefers, if not requires, receipt of necessary data processed by computer[7], even when received later than optimal, so long as it can be digested, which was not impossible herein.

B

Tecom also responded in writing to the ITA's questionnaire, in part as follows:

> 2. *Distribution System*
>
> a. *U.S. Market*
>
> In the U.S. market, Tecom only sells to four customers who are * * * OEM[s]. Tecom sells product to these OEMs under *their* brand name, not *Tecom's* brand name. These OEMs in turn sell to their distributors or supply houses, who in turn sell to dealers, and who in turn sell to end-users. The price * * * increases at each stage in the distribution process (from OEM, to distributor, to dealer, to end-user).
>
> Tecom's U.S. OEM customers themselves promote their brand name, Tecom-made, SBTS in the U.S. market (e.g., through extensive and costly advertising). Further, these OEMs provide significant technical and warranty repair services for their U.S. customers.
>
> b. *Taiwan Market*
>
> In the Taiwan market, Tecom sells SBTS under Tecom's brand name to distributor[s] and dealers. These customers are generally small, family-run operations. Tecom does not sell to OEM[]s in the Taiwan market.
>
> Tecom heavily promotes (e.g., advertises) its brand name SBTS in the Taiwan market to assist its distributors and dealers in selling Tecom SBTS. Further, Tecom provides substantial technical and warranty service support to assist its customers in selling Tecom SBTS.
>
> Tecom's prices to its distributor customers are below its prices to its dealers.[8]

The company requested an adjustment to reflect these different levels of trade. The agency declined, finding that Tecom had not presented evidence justifying such adjustment:

> * * * We do not disagree that certain of Tecom's sales to the United States were made at a different level of trade than the home market

---

[7] *See* ITA General Instruction 4, Plaintiff's Reply Memorandum, Attachment 1, fifth page.

[8] Record Document ("R.Doc") 40, pp. 4–5 (footnotes omitted, emphasis in original). SBTS is the record abbreviation for the company's merchandise, namely, small business telephone systems and subassemblies thereof.

> sales used for comparison purposes. However, in order for Tecom to demonstrate eligibility for a level of trade adjustment, Tecom must show that, where all other factors are equal, home market sales at different levels of trade incur different costs. This would establish that differences between U.S. and home market sales are due to level of trade differences, not other differences in conditions present in two distinct geographical markets. The expenses that Tecom argues are incurred in selling to dealers/distributors that should be used for the level of trade adjustment are technical service expenses, warranty expenses, bad debt, and warehousing. Furthermore, Tecom claims it would incur lower selling expenses (*e.g.*, reduction in staffing, elimination of regional offices) if it sold to OEMs rather than dealers/dis-tributors. However, in making these claims, Tecom has not adequately demonstrated the expenses it would incur in selling to OEMs. Therefore, any adjustment to price would be arbitrary.

57 Fed.Reg. at 29,285. This final determination further rejected the company's referrals to (1) its home-market OEM sales of cordless telephones on the ground that it "ha[d] not adequately demonstrated that [those] phones are of the same general nature as SBTS", (2) its sales in Singapore and Hong Kong on the ground that a level-of-trade adjustment "must be based on home market experience" and (3) the sales of other companies in that market under agency review on the ground that they did not provide information in support of Tecom's position. *Id.* Among other things, the defendants now add that

> Commerce requires that a company establish its claim for level-of-trade adjustment by providing, with *quantifiable* evidence, that the cost differences between sales to the two markets affect price comparability.

Defendants' Memorandum, p. 9 (emphasis in original).

The plaintiff replies that this last point is impermissible post-hoc rationalization. The court concurs. *See, e.g., U.H.F.C. Company v. United States*, 916 F.2d 689, 700 (Fed.Cir. 1990) ("Post-hoc rationalizations of agency actions first advocated by counsel in court may not serve as the basis for sustaining the agency's determination"), citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Atcor, Inc. v. United States*, 11 CIT 148, 153, 658 F.Supp. 295, 299 (1987). The plaintiff attempts to counter the ITA's actual, published reasoning quoted above by claiming it

> requests Tecom to undertake an impossibility—i.e., state what Tecom's prices are at the level-of-trade to which Tecom does not sell in each market.

Plaintiff's Reply Memorandum, p. 3. Further, prior to publication,

> Commerce never asked Tecom to show that differences in costs associated with selling to OEMs versus dealers caused price differences.

Id. at 5, citing Defendants' Memorandum, p. 4 and quoting R.Doc 54, pp. 3–4. As for Tecom's attempted analogies which were rejected by the agency, the plaintiff offers the following responses, among others:

• Since it only sold cordless telephones to OEMs in Taiwan, not dealers, Tecom could not produce respective pricing data. But it did provide evidence with regard to those sales. *Cf.* Plaintiff's Memorandum, pp. 17–18. And the ITA's final determination fails to state why this evidence is inadequate.

• The agency adopted a *per se* rule that third-country market experience is irrelevant which is contrary to law and contrary to the substantial-evidence rule. *Id.* at 18–19.

• As for the home market Taiwan, Tecom did in fact present evidence with respect to a competitor's costs and also to another company's study of costs it would have incurred in sell-ing SBTS to OEMs. *Id.* at 16.

Both sides refer to *American Permac, Inc. v. United States*, 12 CIT 1134, 703 F.Supp. 97 (1988). In that case, the court reaffirmed that the ITA had a "primary duty" to make level-of-trade adjustments, based upon "*reasonable* burdens of proof on the parties to the investigation as may be necessary to reach a final determination." 12 CIT at 1138, 703 F.Supp. at 101, quoting *Fundicao Tupy S.A. v. United States*, 12 CIT 6, 8, 678 F.Supp. 898, 900, *aff'd*, 859 F.2d 915 (Fed.Cir. 1988)(emphasis in original). In remanding to the agency, the court held the

> ITA's requirement that plaintiffs provide the actual price information with regard to home market sales to distributors, which the ITA knew did not exist, is clearly unreasonable, where the very absence of those sales is the legal prerequisite for the level of trade adjustment. The estimation of this adjustment is implicitly required by law, which prescribes this adjustment precisely because no actual sales at a distributors' level of trade existed in Germany. The burden of proof imposed by the ITA in this case, and the ITA's refusal to use any data other than actual, but nonexisting, wholesale [ ] prices traps plaintiffs in a vicious circle and is beyond any standard of reasonableness.

Id. It further found the agency possessed of the expertise necessary to estimate the hypothetical price in the home market and thus not required to rely on data supplied by the respondents. But the ITA "may not reject * * * submissions as purely speculative merely because they contain certain inevitable estimations." 12 CIT at 1139, 703 F.Supp. at 102. There, as here, the foreign plaintiff had furnished trade data for a neighboring, third country, as well as for another company in the home market under review.

The agency's final determination at bar does little more than mention this decision. *See* 57 Fed.Reg. at 29,285. In their brief, the defendants claim that "*American Permac* buttresses Commerce's denial of Tecom's level-of-trade claim"[9] in that "extensive and verifiable home market

[9] Defendants' Memorandum, p. 16.

data"[10] had been submitted therein. Whatever the facts in that case, here the court concludes that its stated principles point to remand to the ITA for reconsideration of plaintiff's plea for a level-of-trade adjustment.

C

The plaintiff further requests that such adjustment reflect that Tecom would not incur expenses for regional sales offices, dealer training, end-user testing for dealers, warranty repair, bad debt, and warehousing finished product if it sold SBTS to OEMs in the home market instead of to dealers or distributors. This request relates to apparent lack of such expenses when Taiwan International Standard Electronics, Ltd., another company subject to the administrative review, sold SBTS to OEMs in that market. The agency's final determination simply states that that firm "did not provide any data to support Tecom's conclusion that a LOT adjustment is warranted." 57 Fed.Reg. 29,285 *(Comment 2)*. But, as indicated above, Tecom did, indicating that in Taiwan OEMs themselves assume such expenses.

D

In general, the ITA recognizes that adjustment for those kinds of expenses "may be appropriate" if they "bear a direct relationship to the sales under consideration" or are "attributable to a later sale of the merchandise by a purchaser". R.Doc 7, p. B–5. And this approach has been sustained on appeal. *See, e.g., Zenith Electronics Corp. v. United States*, 77 F.3d 426 (Fed.Cir. 1996).

To the extent the agency did not make adjustment(s) in this case, the reason stated was essentially lack of supporting evidence, *e.g.*:

> * * * Contrary to Tecom's assertion that its home market warranty expenses should be treated as direct selling expenses, there is no evidence on the record to suggest that its warranty expenses are variable. Rather, Tecom would still incur costs for salaries associated with its home market warranty personnel even if Tecom had no sales within a certain period of time. Accordingly, we consider Tecom's home market warranty expenses to be fixed and thus to be indirect selling expenses.

57 Fed.Reg. at 29,286 *(Comment 4)*. *See id.(Comments 5, 6, 7, 8)*. In deciding to remand to the ITA for reconsideration of this and other claimed adjustments, the court of course reaffirms that any must be based upon adequate data on the record in support thereof. *See, e.g., Zenith Electronics Corp. v. United States*, 18 CIT 882 (1994). For example, the plaintiff seeks adjustment for free gifts in conjunction with its home-market sales. The ITA reported that it could not make any adjustment for them, in part because it could not decipher Tecom's computer tape. To the extent that or other data are or become comprehensible during remand, and reveal that adjustment is warranted, it must be effectuated.

[10] *Id.* at 17.

E

The final relief for which the plaintiff moves is a direction that the agency base any dumping calculation on home-market SBTS sales to dealers, not end-users. The basis of this concern is expressed as follows:

> * * * Tecom had an infinitesimal number of sales to end-users in Taiwan * * *. * * * Commerce should not compare end-user sales in Taiwan to OEM sales in the United States. Instead, Commerce should compare dealer sales in Taiwan to OEM sales in the United States (and then make appropriate level-of-trade adjustments for differences between dealer and OEM sales). Dealers are at a closer level of trade to OEMs than end-users.

Plaintiff's Memorandum, pp. 42–43 (citation and footnote omitted). The defendants contend that this concern is unfounded[11], and the court is unable to find otherwise on the record presented.

II

In view of the foregoing, plaintiff's motion for judgment on the ITA record must be granted to the extent of remand to that agency for further proceedings not inconsistent with this opinion. The defendants may have 90 days for such proceedings and to report the results thereof to the court, whereupon the plaintiff may file written comment(s) within 30 days.

(Slip Op. 97–43)

UNITED STATES OF AMERICA, PLAINTIFF *v.*
SHABAHANG PERSIAN CARPETS, LTD., DEFENDANT

Court No. 96–05–01472

[The Court dismisses defendant's counterclaim due to the failure to file a timely action.]

(Dated April 10, 1997)

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Harold D. Lester, Jr.);* United States Customs Service *(Susan Flood)*, of Counsel, for plaintiff.
Steiner & Schoenfeld, (Gaar W. Steiner, Douglass H. Bartley) for defendant.

OPINION

GOLDBERG, *Judge:* This matter comes before the Court on plaintiff's motion for summary judgment. Plaintiff, the United States Customs Service ("Customs"), seeks summary judgment to dismiss a counterclaim filed by Shabahang Persian Carpets, Ltd. ("Shabahang"). The

---

[11] *See* Defendants' Memorandum, p. 44.

original action, initiated by Customs, involves the recovery of penalties and duties relating to carpets that successfully entered the United States between March 6, 1984 and November 4, 1987. Shabahang's counterclaim involves carpets that Shabahang attempted to import, but were denied entry pursuant to Executive Order No. 12613, which imposed an embargo on imports from Iran after October 29, 1987.[1] 52 Fed. Reg. 41,940 (1987). The counterclaim alleges that Customs effected an unlawful taking under the Fifth Amendment when it denied the entry of the carpets into the United States.

In its summary judgment motion, Customs contends that the Court lacks subject matter jurisdiction under both 28 U.S.C. § 1583 (1994) and 28 U.S.C. § 1581(i)(3) (1994). In the alternative, Customs argues that even if the Court does possess jurisdiction, the action is still time barred and fails to state a claim upon which relief can be granted. In response, Shabahang contends that its counterclaim is not time barred because it constitutes either a "setoff" or "recoupment."

Although the Court finds that it has subject matter jurisdiction under 28 U.S.C. § 1581(i)(3), the Court dismisses plaintiff's counterclaim because Shabahang failed to file an action within the time period set forth in the statute of limitations. The Court also determines that Shabahang's defenses, that the counterclaim constitutes either a "setoff" or a "recoupment," lack merit. The Court does not reach the issue of whether Shabahang's action states a claim upon which relief can be granted.

Standard of Review

When faced with a motion for summary judgment, the Court determines whether a case presents any genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). If a case presents no such issues, and a moving party is entitled to a judgment as a matter of law, then the Court may grant summary judgment. USCIT Rule 56(d).

Since this matter is before the Court on a motion for summary judgment, and it presents no genuine issues of material fact in dispute, granting summary judgment is appropriate.

Discussion

A. *Subject Matter Jurisdiction under 28 U.S.C. § 1583:*

Shabahang filed its action as a counterclaim in an existing case. The Court finds that the claim does not come within its counterclaim jurisdiction under 28 U.S.C. § 1583.

28 U.S.C. § 1583 provides two bases for counterclaim jurisdiction. Pursuant to 28 U.S.C. § 1583, a counterclaim can be filed if (1) the claim involves the imported merchandise that is the subject matter of a pending civil action, or (2) the counterclaim involves recovery upon a bond or customs duties.

---

[1] The last entry at issue in Customs' complaint was permitted to enter the United States six days after October 29, 1987 because it fell within the scope of a regulation relaxing the embargo for goods already loaded aboard vessels or aircraft. *Iranian Transactions Regulations*, 52 Fed. Reg. 44,076, 44,077 (1987), (codified at 31 C.F.R. § 560.403).

With respect to the first basis for jurisdiction under 28 U.S.C. § 1583, Shabahang fails to establish this Court's counterclaim jurisdiction because its counterclaim does not involve merchandise that is the subject of a pending civil action. Rather, the counterclaim involves a different stream of goods than the imported goods that are the subject of Customs' pending civil action.

Furthermore, Shabahang's counterclaim does not involve imported merchandise. Rather, the counterclaim involves goods that were never imported because of the U.S. embargo.

With respect to the second basis for jurisdiction under 28 U.S.C. § 1583, Shabahang fails to establish the Court's counterclaim jurisdiction because its claim does not involve recovery upon a bond or customs duties.

Furthermore, because Customs' claim and Shabahang's counterclaim raise unrelated legal issues, the rationale underlying the Court's jurisdiction to hear counterclaims does not apply in the present case. *See Eastalco Aluminum Co. v. United States*, 14 CIT 724, 727–31, 750 F. Supp. 1135, 1138–41 (1990) (discussing the Court's counterclaim jurisdiction). Customs' tariff recovery and penalty claims involve traditional customs classification and regulatory law. In contrast, Shabahang's claim raises a takings under the Fifth Amendment of the Constitution. The claims do not involve similar issues; hearing Shabahang's action as a counterclaim is inappropriate.

The Court does not have jurisdiction under 28 U.S.C. § 1583. The Court now discusses its jurisdiction under 28 U.S.C. § 1581(i)(3).

B. *Subject Matter Jurisdiction under 28 U.S.C. § 1581(i)(3):*

The Court possesses subject matter jurisdiction over cases involving "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety." 28 U.S.C. § 1581(i)(3).

Because Shabahang's claim involves goods that were prevented from entering the United States due to an embargo, the claim comes within the plain language of 28 U.S.C. § 1581(i)(3).

As discussed above, Shabahang erred by filing this action as a counterclaim in an existing case. Shabahang should have brought this matter as a separate action under 28 U.S.C. § 1581(i)(3). However, the Court does not view this as fatal to Shabahang's claim. Rather, if Shabahang's claim were to survive this summary judgment motion, the procedural defect could be cured by granting leave to file a separate action under 28 U.S.C. § 1581(i)(3).

C. *Statute of Limitations under 28 U.S.C. § 2636(i):*

The Court now considers Customs' contention that Shabahang's claim is time barred under 28 U.S.C. § 2636(i) (1994). The Court finds that it is time barred.

28 U.S.C. § 2636(i) sets forth the statute of limitations for actions filed at the Court of International Trade that arise under 28 U.S.C. § 1581(i). Pursuant to this section, a civil action filed with the Court of Interna-

tional Trade under 28 U.S.C. § 1581(i) is barred unless it is commenced within two years after "the cause of action first accrues." 28 U.S.C. § 2636(i).

In takings actions, the Court of Appeals for the Federal Circuit has repeatedly held that a cause of action accrues "at the time the taking occurs." *See Fallini v. United States*, ____ Fed. Cir. (T) ____, ____, 56 F.3d 1378, 1382–23 (1994); *see also*, *Creppel v. United States*, ____ Fed. Cir. (T) ____, ____, 41 F.3d 627, 633 (1994); *Alliance of Descendants of Texas v. United States*, ____ Fed. Cir. (T) ____, ____, 37 F.3d 1478, 1481 (1995).

In takings cases in which the government passes a statute or promulgates a regulation that effects the taking, the effective date of the statute or regulation has been held to be the date that the taking occurs. *See, e.g.*, *Creppel*, ____ Fed. Cir. (T) at ____, 41 F.3d at 633 (permanent taking claim accrued for limitations purposes on the date the Environmental Protection Agency issued final determination); *Alliance of Descendants of Texas*, ____ Fed. Cir. (T) at ____, 37 F.3d at 1481 (claim accrued when United States treaty went into effect that resolved unsettled property claims between citizens of the United States and Mexico).

In the present case, if a taking occurred, it occurred on October 29, 1987, the date that Executive Order 12613 took effect. Yet, Shabahang filed its counterclaim in August 1996, almost *nine years* after the effective date of President Reagan's Executive Order 12613. This is well after the statute of limitations of 28 U.S.C. § 2636(i) expired. Therefore, Shabahang's claim is time barred.

D. *Shabahang's Setoff Argument:*

Shabahang attempts to defeat the time bar imposed by the statute of limitations by arguing that the statute of limitations does not apply to its action because its action is a "setoff." This argument fails.

A "setoff" is a demand which a defendant holds against a plaintiff that arises out of a transaction extrinsic to plaintiff's cause of action. *In re Smith*, 737 F.2d 1549, 1552 (11th Cir. 1984).

Even if the action is viewed as a setoff, Shabahang's claim is still barred by the statute of limitations. A setoff claim must independently satisfy the statute of limitations. *Chauffeurs, Teamsters, Warehousemen & Helpers, Local Union No. 135 v. Jefferson Trucking Co.*, 628 F.2d 1023, 1027 (7th Cir. 1980) (statute of limitations applies to setoffs and counterclaims because they are affirmative independent causes of action arising outside of transactions in plaintiff's complaint); *United States v. Old World Artisans, Inc.*, 702 F. Supp. 1561, 1569 (N.D. Ga. 1988) (same).

E. *Shabahang's Recoupment Argument:*

Shabahang also challenges the applicability of the statute of limitations based on the theory that its action is a "recoupment." This argument also fails because the claim does not constitute a recoupment.

A "recoupment" is a defensive claim "growing out of [the] transaction constituting plaintiff's cause of action and is available only to reduce or satisfy plaintiff's claim * * *." *Black's Law Dictionary* 1275 (6th ed.

1990). Shabahang is correct that a recoupment is not subject to the statute of limitations. *Bull v. United States*, 295 U.S. 247, 262 (1935) (Recoupment is never barred by the statute of limitations provided the main action is timely.); *Vari-build, Inc. v. City of Reno*, 622 F. Supp. 97, 99–100 (D. Nev. 1985) (same).

However, in order for a claim to constitute a recoupment, the claim must arise out of the same transaction that formed the basis of the plaintiff's claim. *Bull v. United States*, 295 U.S. at 262; *Vari-build*, 622 F. Supp. at 100.

As discussed above, Shabahang's claim is based on a series of attempted importations that were denied entry. These attempted importations are distinct from the stream of imports that are the subject of Customs' original action. Thus, Shabahang's and Customs' claims are based on different transactions. Accordingly, Shabahang cannot rely on recoupment to defeat the statute of limitations in this case.

CONCLUSION

For the foregoing reasons, the Court finds that Shabahang's claim is time barred pursuant to 28 U.S.C. § 2636(i). A separate order dismissing the claim will be entered accordingly.

(Slip. Op. 97–44)

OLYMPIA INDUSTRIAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND WOODINGS-VERONA TOOL WORKS, INC., DEFENDANT-INTERVENOR

Consolidated Court No. 95–10–01339

[Final results in the second administrative review of the antidumping duty order of the U.S. Department of Commerce are affirmed in part, and remanded in part.]

(Dated April 10, 1997)

Graham & James (Lawrence R. Walders, Andrea Fekkes Dynes, Jeffery B. Denning), for plaintiff Olympia Industrial, Inc.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lesleyanne Koch Kessler)*; Office of the Chief Counsel for Import Administration, United States Department of Commerce *(Karen L. Bland)*, of counsel, for defendant.

Wiley, Rein & Fielding (Charles Owen Verrill, Jr., Alan H. Price, Willis S. Martyn III), for defendant-intervenor Woodings-Verona Tool Works, Inc.

OPINION

GOLDBERG, *Judge:* Plaintiff, Olympia Industrial, Inc. ("Olympia"), a United States importer, and defendant-intervenor, Woodings-Verona Tool Works, Inc. ("Woodings"), petitioner in the challenged agency determination, commenced this consolidated action under 19 U.S.C.

§ 1516a(d) and 28 U.S.C. § 2631(c) (1988) seeking judicial review of certain portions of the final results of the United States Department of Commerce's ("Commerce") second administrative review covering the period February 1, 1992 through January 31, 1993 in *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China*, 60 Fed. Reg. 49,251 (Sept. 22, 1995) (final admin. review) ("Final Determination").

In the Final Determination, because the People's Republic of China ("PRC") is a non-market economy, Commerce selected India as the surrogate country in order to evaluate the costs of production in the PRC pursuant to 19 U.S.C. § 1677b(c)(1) (1988).

Olympia and Woodings each challenge Commerce's Final Determination on different grounds. Olympia challenges Commerce's Final Determination on the grounds that Commerce erred when it (1) used surrogate country data to value the steel input when import data for the PRC was available, and (2) calculated inland freight expenses based on the longest distance between input suppliers to factory. Because the Court finds that both of these challenges have merit, it remands Commerce's Final Determination with respect to each.

Woodings challenges Commerce's Final Determination on the grounds that Commerce erred when it (1) rejected certain Indian surrogate data based on a comparison of data from other market economy countries, and (2) valued shipping pallets that were assembled by the importer's suppliers based on surrogate data for the value of a finished pallet. With respect to both issues raised by Woodings, the Court affirms Commerce's Final Determination.

The Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (1988).

Standard Of Review

An administrative review determination by the Department of Commerce in an antidumping investigation shall be upheld unless the Court determines that the determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1988).

The Supreme Court has defined substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

Discussion

A. *Olympia's Challenges:*

1. *Import Data for Steel Input Valuation:*

Olympia challenges Commerce's Final Determination on the grounds that Commerce failed to satisfy its statutory obligation under 19 U.S.C. § 1677b(c)(1) (1988), to first determine that no market-oriented information was available in the administrative record, before it resorted to a "factors of production" methodology involving surrogate country data. *See Antidumping Duties; Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments*, 61 Fed. Reg. 7308, 7344–45 (February 27, 1996) ("Proposed Rulemaking") (Commerce interprets 19 U.S.C. § 1677b(c)(1) to require valuation of inputs based on the prices paid to market economy suppliers if this data is available, rather than based on the prices derived from a surrogate country.). Olympia further asserts that the decision to select surrogate country data over import data is inconsistent with the past practices of Commerce. *Id.*

Commerce has developed a practice of utilizing import data to value inputs where a non-market economy producer uses inputs which are (1) obtained from a market economy producer, and (2) paid for in a market economy currency. *Id.* at 7344 (summarizing Commerce's past practice). The use of market-import data, when available, better satisfies the general purpose of the antidumping statute to "determine margins as accurately as possible." *Oscillating Fans and Ceiling Fans From the People's Republic of China*, 56 Fed. Reg. 55,271, 55,275 (October 25, 1991) (final determination) (citations omitted); *see also*, *Lasko Metal Products, Inc. v. United States*, ___ Fed. Cir. (T) ___, ___, 43 F.3d 1442, 1446 (1994); *Proposed Rulemaking*, 61 Fed. Reg. at 7344–45.

In the present case, Commerce justified its decision not to utilize import data on the grounds that it did "not know what models were produced using the imported steel or the portion of steel used by the factories which was imported." *Final Determination*, 60 Fed. Reg. at 49,254.

The administrative record reveals that Commerce knew that Olympia's suppliers used imported steel in the production process because these suppliers informed Commerce of this as early as December 1993. Letter from Politis, Pollack & Doram on behalf of client Shandong Machinery Import & Export Company to Commerce (December 23, 1993) at 6–7. Yet, Commerce never specifically requested information about what models were produced using imported steel, or the portion of imported steel used by the factories under investigation.

Rather, on at least three occasions, Commerce requested and received information regarding the steel inputs. In its initial questionnaire, Commerce instructed Olympia's suppliers to provide the following information:

> Report whether any input used in the production process is imported. For each imported material, specify the source country, and the actual cost and unit price in the currency paid, including the amounts for any duties, taxes, and transportation costs incurred.

Letter from Commerce to Fujian Machinery & Equipment Corp. (March 24, 1993) at X–3. Later, Commerce requested additional information re-

garding the types of steel used in the production process, the HTSUS number of each factor input, the specifications of the various types of steel, the gross and net quantity and weight for each factor input, and the source of each material entered into the production process. Letter from Commerce to Fujian Machinery & Equipment Import & Export Corp. (March 14, 1994) at 4–5; letter from Commerce to Shandong Machinery Import & Export Corp. (March 14, 1994) at 4–5. Finally, on May 6, 1994, Commerce asked for further information regarding the types and grades of steel used in the production process. Letters from Commerce to Mr. John N. Politis, Esq., on behalf of clients, Fujian Machinery & Equipment Import & Export Corp. and to Shandong Machinery Import & Export Corp. (May 6, 1994).

The Court agrees with Olympia that, based upon the record evidence, Commerce failed to request information regarding "what models were produced using the imported steel or the portion of steel used by the factories which was imported." *Final Determination*, 60 Fed. Reg. at 49,254. If this information was critical to reaching its Final Determination, Commerce failed to provide notice to Olympia and its suppliers that this was the information it was seeking.

Commerce apparently recognizes its error. Commerce requests a remand in order to reconsider whether it should utilize surrogate country data or PRC import data in order to value steel inputs.

The Court remands this matter to Commerce with instructions to reopen the administrative record to allow the parties to provide the necessary information. The Court further instructs Commerce to either change its methodology or provide a clearly articulated rationale explaining why it decided not to utilize PRC import data.

2. *Longest Distance Between Input Suppliers and Factory:*

Olympia contends that Commerce erred when it computed the value of the steel input by adding an amount for inland freight expense based on the longest distance between the various PRC steel suppliers and the factories in the PRC. Specifically, Olympia asserts that Commerce ignored evidence in the administrative record reporting specific distances between factories and steel suppliers.

In its Final Determination, Commerce explained that it uses the longest distances as the best information available under 19 U.S.C. § 1677e(b) (1994) in two situations: (1) when the distances between factory and suppliers are not reported, and (2) when figures on the percentage of material purchased from each supplier are not reported. *Final Determination*, 60 Fed. Reg. at 49,257.

Commerce must make a specific request for information before it may rely on the best information available in the administrative record. *Mitsui & Co. v. United States*, 18 CIT 185, 199 (1994).

Based upon a review of the administrative record, the Court finds that Commerce did not specifically request the information it needed, namely the percentages of steel purchased from each supplier, before it resorted to the best information available.

In the present case, Commerce specifically requested the gross quantity and weight of all inputs, the source of all inputs, including the source location, the distances from the sources to the factory, and the means of transportation. Letters from Commerce to Fujian Machinery & Equipment Import & Export Corp. (March 24, 1993) at X–3.

Olympia's suppliers provided responsive answers to all of Commerce's questions. Nevertheless, these responses did not provide the information that Commerce sought because Commerce failed to sufficiently tailor its questions to elicit information regarding the percentage of steel purchased from each supplier.

As a result, the Court remands this matter to Commerce for the purpose of reopening the administrative record to permit parties to submit evidence regarding the percentages of steel used in the production process purchased from each supplier. Based on the additional information, Commerce should develop a simple or weighted average to reflect the contributions of the various suppliers, or provide a clearly articulated rationale explaining why it decided not to utilize this data.

B. *Woodings-Verona's Challenges:*

1. *Surrogate Country Data:*

Woodings challenges Commerce's Final Determination on the grounds that Commerce acted contrary to law by rejecting certain data from India based upon a comparison of data from the United States and Indonesia. In particular, Woodings contends that if data from Indonesia and the United States was inappropriate to use as surrogate data, it was unreasonable for Commerce to use this data as a benchmark to judge data from the surrogate country. Furthermore, Woodings contends that the rejected Indian data was fully supported and consistent with other Indian data. The Court rejects these arguments.

Woodings invites the Court to substitute its own expertise for that of Commerce in evaluating the selection of the data. The Court declines to do so. Instead, the Court takes its guidance from the standard of review governing this case. Under the substantial evidence standard, the reviewing court may not "even as to matters not requiring expertise * * * displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The Court notes that Commerce selected and evaluated the Indian data during a long and deliberative process. Originally, for the preliminary results of the review, Commerce used the average value of steel bars and rods imported into India that would fall under tariff heading 7213.49 of the Harmonized Tariff Schedules of the United States (HTSUS) as its surrogate value for steel. *Final Determination*, 60 Fed. Reg. at 49,254. Later, for the final results, Commerce used forged bars and rods under tariff heading, 7214.50, HTSUS, because this steel is more similar to that used by the PRC manufacturers. *Id.* Commerce

then concluded that the 1992 data for this tariff heading was acceptable, but that the 1991 data was aberrational. *Id.*

Commerce reached its decision regarding the 1991 Indian import data by comparing it with import data from other market-economy countries. *Id.* Commerce used international trade data from other market economies at a similar level of development, such as Indonesia, as well as data from economies at higher levels of development, such as the United States, in order to provide some idea of the level of prices in the international steel market in 1991. *Id.*

The Court finds that Commerce acted within its statutory authority when it utilized data from other market economies to aid in its factor of production valuation. 19 U.S.C. § 1677b(c)(1); 19 U.S.C. § 1677b(c)(4). The statute does not require Commerce to follow any single approach in evaluating data. *Lasko Metal Products*, ____ Fed. Cir. (T) at ____, 43 F.3d at 1446. Moreover, Commerce's methodology in the present case is consistent with its practice of using data from other market economies to test the reliability of surrogate country data. *See, e.g., Certain Partial-Extension Steel Drawer Slides with Rollers From the People's Republic of China*, 60 Fed. Reg. 54,472, 54,475 (October 24, 1995) (final determination) (tested Indian import data for rivets against Indonesia import price data); *Coumarin From the People's Republic of China*, 59 Fed. Reg. 66,895, 66,900 (December 28, 1994) (final determination) (rejected Indian import statistics to value chlorine because it determined that the data was aberrational based on a comparison with data from five other market countries).

Woodings also contends that the comparison of Indian to U.S. and Indonesian data was unreasonable because the U.S. and Indonesian data covered basket categories of several different types of steel. In contrast, according to Woodings, the Indian data was specific to particular grades, shapes, and sizes of steel bar comparable to that used to produce the merchandise in this case. In support of its argument, Woodings relies on *Sigma Corp. v. United States*, ____ CIT ____, ____, 888 F. Supp. 159, 162 (1995) for the proposition that the comparison of basket categories of steel is inappropriate. The Court rejects this argument.

Woodings misinterprets *Sigma*. In that case, the Court remanded Commerce's results because Commerce compared data from one tariff category to data from a combination of tariff categories. *Id.* However, in the final results of the present case, Commerce compared Indian import statistics to Indonesian and U.S. import statistics based on an identical tariff category, 7214.50, HTSUS. Therefore, Commerce's comparison in the present case was appropriate.

Commerce's comparison of Indian data with U.S. and Indonesian data is both within Commerce's statutory authority and consistent with past practice. Evaluation of data requires Commerce to apply its judgment and expertise. There has been no evidence presented which suggests that Commerce erred in applying its expertise. Rather, Commerce's

comparisons provide substantial evidence that the 1991 Indian figures were aberrational and therefore were properly discarded.

Because Commerce has supported its rejection of the 1991 Indian import data with substantial evidence, the Court affirms the Final Determination with respect to this issue. However, if Commerce decides, pursuant to this Court's remand with respect to the first issue in today's decision, that PRC import data more accurately prices the steel input than the surrogate country data, then Commerce should utilize PRC data rather than Indian data.

2. *Finished Pallets as the Surrogate Value for Assembled Pallets:*

Woodings challenges Commerce's Final Determination on the grounds that Commerce erred when it used the cost of finished pallets as a surrogate value for the cost of pallets assembled by the PRC manufacturers from raw materials. Woodings argues that Commerce was required to use a factors of production approach to value the pallet input. This approach requires Commerce to sum the value of the wood, nails, and labor used to produce the pallets.

Woodings mistakenly believes that the statute requires Commerce to value packing material according to a factors of production approach. The Court disagrees. Although 19 U.S.C. § 1677b(c)(1) requires the administering authority to use a factors of production analysis to value merchandise produced in a non-market economy, it does not specify the same treatment for the packing material accompanying the merchandise. Rather, the statute instructs Commerce to add "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.* Thus, 19 U.S.C. § 1677b(c)(1) provides Commerce with some discretion to value items ancillary to the product, such as packing materials. The provision reflects a policy to provide Commerce with some flexibility for items that are difficult to value according to a factors of production approach, such as profit or overhead expenses, and for items that presumably constitute a small fraction of the value of the merchandise, such as packing materials.

The Court notes that Commerce requests a remand on this issue in order to permit it to clarify its position with respect to the pallets. The Court declines to do so. Apparently, Commerce's request stems from the fact that Commerce used the factors of production approach in the third administrative review. *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China*, 61 Fed. Reg. 15,028, 15,030–31 (April 4, 1996) (final, third admin. review). While substantial questions are raised in the briefs about the methods utilized in the third period of review, the third period of review is not the subject of the present case. Hence, the Court will not grant Commerce's open-ended remand request because these issues can be addressed if the third period administrative review is litigated before this Court.

Because Commerce acted in conformity with 19 U.S.C. § 1677b(c)(1) when it used the cost of a finished pallet to value pallets in the second

administrative review, the Court upholds the Final Determination with respect to this issue.

CONCLUSION

The Court remands the Final Determination with respect to (1) Commerce's use of surrogate country data for valuation of the steel input when import data is available, and (2) Commerce's use of the longest distance between factory to suppliers to calculate inland freight expenses. The Court affirms Commerce's Final Determination with respect to (1) Commerce's rejection of certain data from the surrogate country India based on data from other market economy countries, and (2) Commerce's use of the cost of a finished pallet to value pallets that were assembled from raw materials. A separate judgment and order thereon will be entered accordingly.

NOTICE

Pursuant to 28 U.S.C. § 2071(b), notice is given of certain proposed amendments to the Rules of the United States Court of International Trade. The proposed amendments were recommended by the court's Advisory Committee, which was appointed pursuant to 28 U.S.C. § 2077(b). The proposals amend Rules 5, 28, 43, 71, 82 and Form 1A.

This notice is given to provide the public, the bar and others interested in the work of the United States Court of International Trade with an opportunity to comment on the proposed amendments. The comment period is open until Thursday, May 15, 1997.

A copy of the proposed amendments may be obtained by contacting Leo M. Gordon, Assistant Clerk, at 212–264–7090.

Dated: April 7, 1997.

RAYMOND F. BURGHARDT,
Clerk of the Court.

Index

Customs Bulletin and Decisions
Vol. 31, No. 18, April 30, 1997

U.S. Customs Service

Customs Service Decision

General Notices

CUSTOMS RULINGS LETTERS

Proposed Rulemaking

U.S. Court of International Trade

Slip Opinions

Notice

Federal Recycling Program
Printed on Recycled Paper
U.S. G.P.O. 1997–417–405–40031